(1)

83-2040

No.

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1983

WILCOMB E. WASHBURN

Petitioner,

v.

LELIA K. WASHBURN

Respondent.

PETITION FOR WRIT OF CERTIORARI
TO THE COURT OF APPEALS OF THE
DISTRICT OF COLUMBIA

Wilcomb E. Washburn, pro se
2122 California St., N.W.
Washington, D. C. 20008
(202) 462-4134

151 pp

QUESTIONS PRESENTED FOR REVIEW

I. Can a resident alien spouse insulate foreign property (including property acquired with joint funds) from the effects of a U. S. divorce decree, thus denying equal protection of the laws to a U. S. citizen spouse?

II. Was equal protection denied by the fact that there was insufficient judicial separation between the division of the District of Columbia Court of Appeals (consisting of but one appellate judge) that decided petitioner's four consolidated appeals, and the several Superior Court judges whose decisions were being challenged?

III. Did the Court having jurisdiction to divide and assign 100% of the marital property also have the responsibility and power to mandate that such property be used in at least a minimally effective economic fashion? In the alternative, was the failure to utilize such a given power a denial of the constitutional rights of one of the parties when said property was awarded to the other party based on its asserted net return of one half of 1% of its capital value?

IV. Was equal protection denied and due process violated by the failure of the Court of Appeals to deal with virtually all of the arguments made by appellant, including arguments based on the trial court's alleged denial of appellant's constitutional rights, when said arguments were not mooted by the arguments actually considered and decided?

V. May, and did, the Court of Appeals give preferential treatment to a member of the Bar over a pro se party?

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OPINIONS BELOW

The District of Columbia Court of Appeals entered its unpublished Memorandum Opinion and Judgment affirming the decisions of the lower court on January 24, 1984. A copy of that memorandum is attached as Appendix A-3.

Petitioner filed a petition for rehearing/rehearing en banc on February 16, 1984. The District of Columbia Court of Appeals denied the petition on March 16, 1984. A copy of that order is attached as Appendix A-14.

The District of Columbia Superior Court issued its Memorandum Opinion and Order in the basic case at issue on March 26, 1981. A copy of that memorandum is attached as Appendix A-16.

The District of Columbia Superior Court issued its Order of June 1, 1981, modifying its Order of March 26, 1981. A

copy of that order is attached as Appendix A-93.

The District of Columbia Superior Court issued its Order denying plaintiff's motion to manage property and granting defendant's motion to compel compliance with judgment, on October 26, 1981. A copy of that order is attached as Appendix A-101.

The District of Columbia Superior Court issued its Order holding plaintiff in contempt on February 10, 1982. A copy of that order is attached as Appendix A-104.

The District of Columbia Superior Court issued its Order denying plaintiff's request for clarification of its Order of February 10, 1982, on April 14, 1982. A copy of that order is attached as Appendix A-110.

The District of Columbia Court of Appeals issued its Order, in a related appeal, No. 83-331, denying appellant's motion for attorney's fees, on May 8, 1984. A copy of that order (the slip opinion therein) is attached as Appendix A-111.

JURISDICTION

The jurisdiction of this Court is invoked under Title 28, United States Code, Section 1257.

CONSTITUTIONAL PROVISIONS INVOLVED

United States Constitution, Amendment V:

> nor shall any person . . . be deprived of life, liberty, or property, without due process of law. . . .

United States Constitution, Amendment XIV:

> nor shall any state deprive any person of life, liberty, or property without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws. . . .

STATEMENT OF THE CASE

On March 26, 1981, the District of Columbia Superior Court issued its Memorandum Opinion and Order granting a divorce to petitioner, and making a series of "awards". (One of the many errors of the trial court was to use obsolete terminology derived from the period preceding the District of Columbia Marriage and Divorce Act of 1977, which replaced the pre-1977 term "award" by the words "assign" and "distribute" (D. C. Code 16-910 [a] and [b]) and made the divorce effective only after final disposition of the appeal.)

On petitioner's motion to reopen proceedings and to amend the order, the court modified its March 26, 1981, order by another of June 1, 1981. On July 13, 1981, petitioner entered an appeal from the judgment.

By a subsequent order of October 26, 1981, the court denied petitioner's request to manage--pending outcome of the appeal--the one house in the District of Columbia "awarded"

him and on which his wife reported a monthly net income of $22. At the same time the court granted defendant-wife's motion to compel compliance with the judgment--requiring transfer of legal title to the eight houses in the District of Columbia "awarded" defendant--despite the pending appeal and despite the provisions of D. C. Code 16-920 (See Argument IV).

The court's order of October 26, 1981, was enforced by a contempt order of February 10, 1982. Petitioner's request for a stay of the order, because of the irreparable damage petitioner might suffer, under this court's ruling in U. S. v. Davis, 370 U.S. 65, 8 L ed 2d 335, 82 S Ct 1190 reh den 371 U.S. 854, 9 L ed 2d 92, 83 S Ct 14, 15 (1962), from the extraordinarily unequal division of property, was denied.

Petitioner's Request for Clarification of Superior Court's Denial of Plaintiff's Request for Supersedeas, filed February 16, 1982, asking, as a claimed constitutional

right, that the court specify the character of a sufficient bond if only to facilitate consideration by the Court of Appeals of the question of the validity of the denial of supersedeas to petitioner, was ignored.

Petitioner's Request for Clarification of the Contempt Order of February 10, 1982, which asked the court to authorize deferral of payment of the two $7,500 awards triggered by the transfer of legal title of the properties awarded until petitioner could sell or refinance the property awarded him in order to obtain funds to pay the awards, was denied.

Federal questions sought to be reviewed by this court were timely and properly raised at every stage of the case in both the Superior Court and the Court of Appeals in petitioner's briefs and motions, but were not dealt with by either court and were not mooted by the arguments actually considered and decided.

ARGUMENT I

THE DECISION OF THE DISTRICT OF COLUMBIA COURT OF APPEALS PERMITS A FOREIGN NATIONAL EFFECTIVELY TO INSULATE FOREIGN PROPERTY FROM THE EFFECTS OF A UNITED STATES DIVORCE DECREE THUS DENYING EQUAL PROTECTION OF THE LAWS TO AN AMERICAN CITIZEN SPOUSE

The trial court, as the first question presented for review noted, concluded that

> while Defendant's properties in Glyfada and Hydra may make her a wealthy woman in Greece, the Court has already found that these properties are of no financial worth to her in the United States. The Court cannot consider these properties, therefore, when determining Defendant's needs for alimony or the distribution of the marital property (Order of March 26, 1981, Appendix A-71,72).

The basis for the court's determination is stated elswhere in the Order where the court

> concludes that these properties [two seaside villas and a smaller house near Athens, and an island house on Hydra] are essentially of no monetary value to the Defendant. . . . Most signficantly, even if she were to sell the property, she would not be able to take the proceeds out of Greece. . . . So for all practical purposes, the Defendant cannot liquidate the properties so as

to convert them to U. S. dollars (Order of March 26, 1981, Appendix A-54, 55).

The Court of Appeals affirmed the trial court's decision, asserting--despite the words of the trial court's order--that "the Greek property was not excluded from consideration" by the trial court. The Court of Appeals concluded that the trial court correctly found the Greek property to be of "no monetary value" to defendant. Court of Appeals Memorandum Opinion and Judgment of January 24, 1984, Appendix A-9,10.

Extensive testimony was heard on the value and income from the four Greek properties, one of which was purchased with joint funds by petitioner and defendant during the marriage. The $1,012,500 appraisal of the land value of the Glyfada properties by petitioner's expert witness was challenged by counsel

for defendant, and the trial court indicated that it had "considerable difficulty with affording this testimony any great weight" (Appendix A-53).

The appellatecourt's assertion that "appellee had never received income" from the Greek properties (Appendix A-12, f.n.4) is true only in the sense that the rents from the four Greek houses were kept in Greece to help maintain the houses and for the use of defendant during her yearly visits to Greece.

Both courts seem to have assumed that only income that could be brought into the United States could be considered in determing the property settlement and alimony. Neither court seems to have been aware of the fact that the Internal Revenue Service tax regulations apply to foreign income of resident aliens in the United States.

While the precise value of the Greek properties were, and can be, vigorously

disputed, the fact that defendant, on October 23, 1980, six months prior to the trial, through her Athens lawyer (empowered with her power of attorney) entered into a formal agreement (#18396) with the Greek Government by which she agreed to pay an inheritance tax of 4,261,859 drachma (approximately $100,000 by 1980 rates of exchange) on the properties at issue indicates that they were of more than nóminal value. It was disingenuous of the Court of Appeals, in the face of the existence of the official Greek document recording this agreement in the Record on Appeal, and in the face of defendant's willingness to pay $100,000 inheritance tax to retain this property, to affirm the trial court's conclusion that the Greek properties were of "no monetary value" to her. Appeal No. 82-455, Supplementary Record on Appeal, pp. 27-29 (English translation certified by Greek Embassy) and pp. 30-36 (Greek document).

Whether or not the Greek property was of any value to defendant <u>in the United States</u>,

it was clearly of value to defendant in Greece, of which defendant is a citizen. For courts of the United States to exclude this property (including property acknowledged by defendant to have been purchased in part with petitioner's funds) "when determining Defendant's needs for alimony or the distribution of the marital property," while awarding defendant eight of the couple's ten U. S. properties, $1,000 a month alimony, and $7,500 attorney's fees, was to deny a citizen of the United States equal protection of the laws of his own country.

The ruling, if allowed to stand and be cited, means that any foreign national can effectively insulate foreign property from the effects of a U. S. divorce decree. Possibly because the appellate court realized that the decision would have this effect it issued its judgment in an unpublished and non-citable Memorandum Opinion and Judgment. See Argument II.

ARGUMENT II

THE DECISION OF THE DISTRICT OF COLUMBIA COURT OF APPEALS WAS MADE BY A DIVISION OF THE COURT INSUFFICIENTLY INSULATED FROM THE COURT WHOSE DECISIONS WERE BEING REVIEWED

The division of the Court of Appeals that participated in the decision on the four consolidated appeals consisted of a single appellate court judge and a single Superior Court judge, sitting by designation. The court took 14 months to arrive at its decision. While District of Columbia Code # 11-707 (a) permits Superior Court judges to be assigned temporarily to serve on divisions of the Court of Appeals "whenever the business of the District of Colubmia Court of Appeals so requires," petitioner would argue that judges brought up from the lower court should never sit in a position of numerical and functional equality with appellate judges whose responsibility it is to review the legal errors and abuses of discretion of the lower court. By such

temporary elevations, such trial-level judges, trained to defer to co-equal colleagues, are put in the position of overruling or affirming their brethren without the experience and insulation (emotional and institutional) of being permanent reviewing judges.

Immediately subsequent to the decision in the case at issue, the Board of Judges of the District of Columbia Court of Appeals proposed two new provisions in its Internal Operating Procedures. One provision would require three members of a motions division to participate when a motions division ruling is to be published. The other would require, after the recusal of a judge after the case is submitted or argued (as occurred in Washburn) that a third judge be drawn for any submitted or argued case requiring a published opinion. District of Columbia Court of Appeals, Notice No. M 151-84, dated March 23, 1984, Appendix A-107.

The action of the Board of Judges of the

District of Columbia Court of Appeals, in proposing such changes in its internal operating rules, suggests a recognition of the importance of assuring that three-judge panels decided important cases. The failure of the Court of Appeals to publish its opinion may have been an expedient attempt to shield the precedential significance of its judgment from outside judicial scrutiny or future citation as well as an effort to minimize the importance of the ruling in order to justify the fact that only a single appellate judge participated in the decision.

The Court of Appeals failure to publish its decision may have been in violation of Paragraph 3:731 (Standards for Publication of Opinion), 2 Fed. Proc. L Ed. 658, which states that

> The appellate court must also determine that no error of law appears and that an opinion would not have precedential value when it determines not to publish a full opinion in a case.

Appellant asserts that his constitutional rights were not fully protected when his four appeals from decisions of several judges of the Superior Court of the District of Columbia were decided, in an unpublished opinion, by a two-judge panel of which only one judge was an appellate court judge.

ARGUMENT III

THE TRIAL COURT AND COURT OF APPEALS IGNORED ELEMENTARY LAWS OF ECONOMICS AND PETITIONER'S RIGHT TO EQUAL PROTECTION BY ALLOWING DEFENDANT TO RETAIN 12 HOUSES PRODUCING A REPORTED MONTHLY NET INCOME OF $934 (REPRESENTING AN ANNUAL RETURN OF 1/2 OF 1% ON THE APPROXIMATELY $2,000,000 ASSESSED VALUATION OF THE PROPERTIES) WHILE REQUIRING PETITIONER TO MAKE UP THE DIFFERENCE IN INCOME "NEEDED" BY DEFENDANT BY PERMANENT MONTHLY ALIMONY OF $1000

The marital property was divided as follows:

Greek Houses	2 Maro St. Glyfada	(2-story)	Awarded to wife
	17 Diadoch. Pavlou,Glyfada	(3-story)	Awarded to wife
	17 Diadoch. Pavlou,Glyfada	(1-story)	Awarded to wife
	Hydra Island Harbor house	(4-story)	Awarded to wife
American Houses	327 East Capitol St. S.E.	(3-story)	Awarded to wife
	643 Massachusetts Ave. N.E.	(3-story)	Awarded to wife
	723 Massachusetts Ave. N.E.	(3-story)	Awarded to wife
	635 South Carolina Ave.S.E.	(3-story)	Awarded to wife
	126 11th St., S.E.	(3-story)	Awarded to wife
	644 N.Carolina Ave.S.E.1/3	(2-story)	Awarded to wife
	641 Independence Av.S.E.1/3	(2-story)	Awarded to wife
	2338 Massachusetts Ave.N.W.	(4-story)	Awarded to wife
	606 East Capitol St. N.E.	(3-story)	Awarded to husband
	Westover, Md. farm (73 acres)		Awarded to husband

The trial court asserted that it was bound by the decision of the District of Columbia Court of Appeals in Skiff v. Skiff D.C. App. 277 A.2d 284 (1971)

> that the trial court, in making a determination of alimony, is limited to actual income figures at time of trial, not what increased amount could be earned at some time in the future (Superior Court's Order of March 26, 1981, Appendix A-91, f.n. 12; cf. A-63,A-71).

The assertion of the Superior Court that it was bound by the Court of Appeals ruling in Skiff was vigorously challenged by petitioner as inapplicable and inapposite in the present case and contradicted, in any event, by numerous other decisions of the District of Columbia Court of Appeals, as in Cefaratti v. Cefaratti, D.C. App. 315 A.2d 142 (1974), in which the Court of Appeals ruled that the lower court can take into consideration capital assets, as well as reported income, in determining an individual's legally valid "real" income. The Court of Appeals ignored petitioner's argument and silently allowed

the trial court's interpretation of Skiff to stand.

To let the present decision stand suggests that a trial court judge is prevented from considering the most effective use of property. It also means that any spouse, prior to divorce, by deliberately going into debt in order to enlarge his or her capital assets can so reduce his or her net income as to be able to call upon the court to require the other spouse to make up the difference between the first spouse's reported net income and his or her needed income, even though the other spouse may possess less than 5% of the capital assets of the first spouse. Thus the court, in the exercise of its broad discretion, can require the poorer spouse to pay alimony to a vastly wealthier spouse, as in Washburn. Petitioner questions whether the concept of equal protection can be so easily overridden by the concept of judicial discretion.

ARGUMENT IV

THE DECISION OF THE DISTRICT OF COLUMBIA COURT OF APPEALS IGNORED NUMEROUS ARGUMENTS DEALING WITH SPECIFIC LEGAL ERRORS AND ABUSES OF DISCRETION THAT WERE NOT MOOTED BY THE ARGUMENTS ACTUALLY CONSIDERED AND DECIDED BY THE COURT.

Petitioner would cite but two of many examples of the failure of the Court of Appeals to consider arguments raised on appeal. The Superior Court's Order of October 26, 1981 (Appendix A-101), enforced by a contempt order of February 10, 1982 (Appendix A-104) forcing legal transfer of title to eight U. S. houses "awarded" defendant and two U. S. properties "awarded" petitioner, ignored petitioner's argument that the transfer of title violated the provisions of D. C. Code 16-920, that

> A decree, annulling or dissolving a marriage, and granting an absolute divorce, shall not become effective until the time for noting an appeal shall have expired, and, if notice of appeal has been entered, such decree shall not become effective until the date of the final disposition of the appeal.

The trial court based its decision to grant defendant's motion to execute the judgment on grounds of petitioner's failure to provide a supersedeas bond, but ignored petitioner's proferred commitment in lieu of a financial bond, as well as petitioner's request that the court specify the character of a supersedeas bond if it denied petitioner's contention that none was required since petitioner--not defendant--was suffering a financial loss by the taking of the appeal since all the houses awarded defendant, as well as the District of Columbia house awarded petitioner, were already in defendant's possession and enjoyment. Neither the Superior Court nor the Court of Appeals deigned to respond to, let alone discuss, petitioner's arguments concerning the nature of the supersedeas necessary to stay the execution of the judgment pending appeal.

Petitioner would cite a second among many examples of the court's disregard of its own

rules and petitioner's rights, e.g., the fact that the trial judge ignored petitioner's affidavit of personal bias and prejudice against her (neither denying the request that she recuse herself nor recusing herself, as required by Rule 63-I of the Civil Rules of the Superior Court of the District of Columbia), and continued to act in subsequent motions in the case.

Petitioner asserts that in these two instances, and in numerous other instances, the Court of Appeals simply ignored petitioner's arguments and thereby violated petitioner's constitutional right to a fair trial.

ARGUMENT V

THE DISTRICT OF COLUMBIA COURT OF APPEALS GAVE PREFERENTIAL TREATMENT TO A MEMBER OF THE BAR OVER PETITIONER ACTING PRO SE

Petitioner was represented by counsel in the four years, 1977-1981 (two years of informal negotiation, two years of formal court activity) that it took to bring the case to trial. No extraneous issues of child support or custody were involved in the case: property division was the single basic issue. After expending over $40,000 on legal expenses to get the case through trial, and while burdened with court-ordered payments that exceeded his total net income for an extended period, petitioner could avail himself of his right to appeal only by representing himself.

Petitioner asserts that the Superior Court and the Court of Appeals consistently accorded preferential treatment in the post-trial period to counsel for defendant, who

was allowed to act as an "officer of the court," taking upon himself judicial prerogatives such as claiming the authority to waive specific provisions of a court order without reference to the judge or court making the order. The Court of Appeals mildly rebuked counsel for defendant in a related appeal (Washburn v. Washburn, Appeal No. 83-331, decided May 8, 1984, D.C. App., ____A.2d 875, at 881-882, pp. 7-8 of slip opinion, Appendix A-111), speaking of his "precipitous filing" of a contempt motion and noting that "cousel [for defendant] was not justified in offering to 'waive' the requirement of the court's order. . . ."

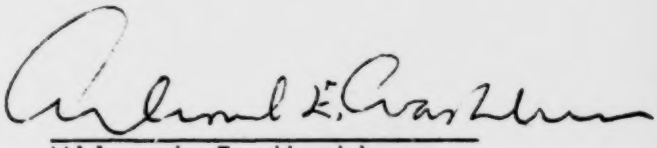
Both the trial court and the Court of Appeals overlooked or condoned similar behavior by counsel for defendant in the case at issue, but repeatedly ignored petitioner's arguments, failed to act on

his motions, and otherwise clearly indicated that he was not being treated on a plane of equality with opposing counsel. This differential treatment of the two advocates in the case violated, petitioner would assert, his constitutional right to equal treatment and to a fair trial.

CONCLUSION

Because petitioner believes that his constitutional right to equal protection and due process were violated by the courts below, petitioner Wilcomb E. Washburn respectfully requests that a writ of certiorari issue to review the judgment of the District of Columbia Court of Appeals.

Respectfully submitted,



Wilcomb E. Washburn,
pro se

DATED: 12 June 1984

No.

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1983

WILCOMB E. WASHBURN,

Petitioner,

v.

LELIA K. WASHBURN,

Defendant.

PETITION FOR WRIT OF CERTIORARI
TO THE COURT OF APPEALS OF THE
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APPENDIX

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DISTRICT OF COLUMBIA
COURT OF APPEALS

Nos. 81-906, 81-1326,
82-225 & 82-455

WILCOMB E. WASHBURN,

Appellant,

v. D696-79

LELIA K. WASHBURN,

Appellee.

Appeals from the Superior Court of the District of Columbia, Family Division

(Hon. Gladys Kessler, Trial Judge;
Hon. Peter H. Wolf, Motions Judge)

(Argued November 4, 1982 Decided January 24, 1984) (Filed Jan. 24, 1984)

BEFORE: Mack and Ferren,[1] Associate Judges, and Kennedy, Associate Judge, Superior Court of the District of Columbia.[2]

MEMORANDUM OPINION AND JUDGEMENT

These consolidated appeals are brought from various rulings of the trial court

in connection with divorce proceedings instituted by appellant-husband on the grounds of separation from appellee-wife for more than one year. We affirm in all respects.

Following a bench trial, commencing in February 1981 and extending over some 6½ days, the trial court, on March 25, 1981, made extensive findings of fact and conclusions of law in granting appellant's application for divorce, awarding appellant-husband sole ownership of two jointly owned real properties (one in the District of Columbia and one in Maryland) and substantially all of the personal property requeste by him, and awarding appellee-wife ownership of seven real properties in the District of Columbia (three of which were titled in her name) and $1,000 per month alimony. Appellant was ordered to pay appellee's attorney $7,500 as his contribution toward her legal fees, and to reimburse appellee

$7,750 as his share of income taxes paid by appellee on the parties' 1977 joint income tax return.

On July 20, 1981, appellant filed a notice of appeal. Thereafter he filed a motion to manage, pending appeal, certain property and appellee moved to compel conveyance to her of the title to properties awarded to her. The court denied appellant's motion and granted appellee's motion on October 26, 1981. On February 10, 1982, following a motion by appellee, appellant was held in contempt of court for failing to convey title to the properties to appellee. Appellant's Request for Clarification of the February 10, 1982 Order was denied on April 14, 1982.

In this court, appellant first challenges the Memorandum Opinion and Order of March 26, 1981. He contends that the trial court abused its discretion in its assignment

and distribution of marital property and in awarding alimony to appellee. He further contends that the court abused its discretion in ordering him to pay a portion of appellee's attorneys fees and ordering him to reimburse appellee one half the amount expended in satisfying a joint income tax obligation. Finally, appellant argues that, because a notice of appeal had been filed on July 20, 1981, the trial court lacked jurisdiction to issue its October 26, 1981, February 10, 1982 and April 14, 1982 orders. On this record, and despite the number of issues urged upon us, we need only address (and that only summarily) the soundness of the trial court's ruling with respect to distribution of property and award of alimony.[3]

We begin with a principle so well-established that it hardly bears repeating--that the trial court is accorded broad discretion in adjusting property rights incident

to a divorce, Powell v. Powell, 457 A.2d 391, 393 (D.C. 1983) (per curiam); Leftwich v. Leftwich, 442 A.2d 139, 142 (D.C. 1982); Benvenuto v. Benvenuto, 389 A.2d 795, 797 (D.C. 1978). As long as the trial court properly applies the statutory guidelines and considers all of the relevant factors, its conclusions will not be disturbed on appeal. Hackes v. Hackes, 446 A.2d 396, 402 (D.C. 1982); Benvenuto v. Benvenuto, supra, 389 A.2d at 797. When distributing marital property, the court must consider

> all relevant factors including but not limited to: the duration of the marriage, any prior marriage of either party, the age, health, occupation, amount and sources of income, vocational skills, employability, assets, debts, and needs of each of the parties, provisions for the custody of minor children, whether the distribution is in lieu of or in addition to maintenance, and the opportunity for each for future acquisition of assets and income. The court shall also consider the party's contribution to the acquisition, preservation, appreciation,

> dissipation or depreciation in value of the assets subject to distribution ... and each party's contribution as a homemaker or to the family unit.

D.C. Code # 16-910 (b) (1981).

Similarly, with respect to the award of alimony, our scope of review is limited, Finch v. Finch, 378 A.2d 1092, 1093 (D.C. 1977). In exercise of its discretion the trial court should consider factors such as

> the duration of the marriage, the ages and health of the parties, their respective financial positions, both past and prospective, the wife's contribution to the family support and property ownership, the needs of the wife and the husband's ability to contribute thereto, and the interest of society generally in preventing her from becoming a public charge.

McEachnie v. McEachnie, 216 A.2d 169, 170 (D.C. 1966).

One cannot read the 37½ page Memorandum Opinion of the trial court without concluding that her resolution of the issues was made after meticulous consideration of relevant

factors and just and reasonable balancing of equities. Moreover, one cannot read the voluminous record without concluding that her findings are supported therein. We find no abuse of discretion in the distribution of property or the award of alimony.

Appellant, however, alluding to himself as the poorer spouse and appellee as the richer spouse, argues in this court that the trial court improperly excluded from consideration, in property distribution and award of alimony, property acquired by appellee in Greece allegedly worth over a million dollars. Appellant's conclusion is erroneously drawn from a statement of the court, taken out of context, to the effect that it could not consider the Greek property in determining appellee's need for alimony or distribution of marital property. The short answer to appellant's argument is that the Greek property was not excluded from consideration. A good

part of the record is devoted to attempts to establish the value of the property as an asset, its location, its use, its marketability, its condition, its potential for sale or production of income, its actual ownership. The trial court questioned the credibility of the "expert" real estate witness produced by the appellant; the court found that it could give no weight to this testimony as to valuation. In concluding that the property was a gift to appellee from her family, the court likewise concluded that it was of no monetary value to her. There is ample evidence in the record to support this conclusion.[4] Given likewise the evidence as to the respective health of the parties, their incomes, their contributions to the marriage, their future outlook for security and well-being as well as the evidence showing the role of appellee in accumulating practically all of the American realty acquired during

the marriage, we cannot say that the existence of the Greek property as an asset would have required a different distribution than that ordered. At this juncture we cannot substitute our judgement for that of the trial court. Accordingly, it is

ORDERED and ADJUDGED that the judgment or appeal be, and hereby is, affirmed.

FOR THE COURT:

/s/ Alan I. Herman
Clerk of the Court.

FOOTNOTES:

1. Associate Judge FERREN participated at oral argument but did not participate in the decision of this case.

2. Sitting by designation pursuant to D.C. Code # 11-707 (a) (1981).

3. As to the trial court's jurisdiction to dispose of post-judgment motions, appellant is correct insofar as he notes that jurisdiction of a case passes to this court once an appeal is filed. It is nevertheless true that the Superior Court maintains jurisdiction to enforce judgments previously issued. See Floyd v. Leftwich, 456 A.2d 1241, 1243 (D.C. 1983);

Morfessis v. Hollywood Credit Clothing Co., 163 A.2d 825, 827 (D.C. 1960).

Moreover we need give scant attention to appellant's contentions that the trial court abused its discretion in 1) ordering reimbursement to appellee for a joint income tax obligation and in 2) ordering appellant to pay a portion of appellee's attorney fees.

As to the former issue, the record shows that appellee borrowed $14,000 to pay a tax obligation to the Internal Revenue Service owed for the 1977 joint income tax return filed by the parties. Interest on the loan amounted to $1,500. Appellant offers no convincing argument to challenge his responsibility for paying one-half of this amount ($7,750).

As to the attorney fees, D.C. Code # 16-911 (a)(1) (1981) provides that a court may require the husband or wife to pay legal fees for a suit brought to obtain alimony. An award of attorney fees rests within the sound discretion of the trial court and will not be disturbed absent a strong showing that the award is so arbitrary as to constitute an abuse of discretion. Darling v. Darling, 444 A.2d 20, 23 (D.C. 1982). The trial court is not bound by any mathematical computation, "consideration should instead, be given to many factors, including the quality and nature of the services performed, the necessity of such services, the results obtained from the services, and the [spouse's] ability to pay." Id. at 23 quoting (Ritz v. Ritz, 197 A.2d 155, 156-57 (D.C. 1964)). The March 26 Order made specific findings of fact in direct support of the $7,500 award for counsel fees and there is sufficient evidence in the record to support the decision. See D.C. Code # 17-305 (b) (1981). We find no abuse of discretion by the trial court.

4. There was testimony that the property was only of modest and sentimental value, that it was in deteriorating condition, that appellee had never received income therefrom and that there had never

been an intention to sell. Appellant's own expert witness testified that one could not take money out of Greece without special permission.

DISTRICT OF COLUMBIA
COURT OF APPEALS
500 Indiana Avenue, N.W.
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Nos. 81-906, 81-1326, 82-225, and 83-455

WILCOMB E. WASHBURN, Appellant,

v. D696-79

LELIA K. WASHBURN, Appellee.

BEFORE: Newman, Chief Judge; *Kern, *Nebeker, **Mack, *Ferren, Pryor, Belson, Terry, and *Rogers, Associate Judges; and **Kennedy, Associate Judge, Superior Court of the District of Columbia, sitting by designation pursuant to D.C. Code # 11-707(a) (1981).

ORDER

On consideration of appellant's petition for rehearing/rehearing en banc, it is

ORDERED by the merits division that appellant's petition for rehearing is denied. It appearing that no judge of this court has called for a vote thereon, it is

FURTHER ORDERED that appellant's petition for rehearing en banc is denied.

PER CURIAM

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* Associate Judges Kern, Nebeker, Ferren, and Rogers have recused themselves from participating in this case.

** Denotes merits division.

Filed March 16, 1984

SUPERIOR COURT OF THE

DISTRICT OF COLUMBIA

FAMILY DIVISION

DOMESTIC RELATIONS BRANCH

WILCOMB E. WASHBURN	)	
	)	
Plaintiff,	)	
	)	
v.	)	Docket No. D-0696-79
	)	
LELIA K. WASHBURN	)	
	)	
Defendant.	)	

MEMORANDUM OPINION AND ORDER

I. Introduction

This matter is before the Court on Plaintiff's Complaint for Absolute Divorce based on involuntary separation of one year, and Defendant's Answer thereto. The issues before the Court, in addition to the absolute divorce, are the distribution of nine pieces of real property acquired by the parties during the marriage, the distribution of the personalty

held jointly by the parties, an award of alimony to the Defendant, and attorney's fees.

Trial commenced on February 2, 1981 and was completed on February 11, 1981. During approximately six and a half days of trial, the Court heard the very lengthy testimony of each party, as well as their respective witnesses, including the testimony of two real estate experts on the value of the realty and personalty, the testimony of two accountants (one for each side) on the various tax effects of alimony payments and property distribution, and the testimony of two doctors as to Defendant's mental and physical health. In addition to hearing lengthy substantive testimony, the Court closely observed the demeanor and credibility of each party and their witnesses, as well as heard argument of counsel and examined numerous pieces of documentary evidence and the rather extensive record. Having heard and considered all of

this factual testimony and evidence, as well as the applicable case law and statutory provisions, the Court has made the following final disposition and resolution of the issues raised in this case.

II. Factual Background.

A. Personal and Marital History

The Plaintiff and Defendant met in the late 1940's at Harvard University, in Cambridge, Massachusetts where they were both graduate students. Plaintiff, a graduate of Dartmouth College, was working on a doctoral degree in American History and American Civilization. Defendant, having done undergraduate work at Pierce College in Greece, and Columbia University, was studying American history. The parties were lawfully married in San Diego, California on July 14, 1951, and lived for the first year and a half of their marriage in Oceanside, California, Plaintiff having

been recalled into the Marine Reserve. The parties returned to Harvard University in 1952 and remained there until 1955, except for one year when they were at Oxford University in England on a fellowship grant Plaintiff received. During this period Defendant completed her coursework for a doctoral degree, but did not begin working on her thesis; she has received a Master's degree from Harvard in American history. The parties received help from their families and worked at odd jobs to support themselves during this period. Specifically, Defendant did modelling work for several painters and sculptors, did housesitting and babysitting, and while in California, did volunteer work for the Navy Relief fund.

In 1955, the parties moved to Williamsburg, Virginia where Plaintiff had been offered a position as a fellow at the Institute of Early American History and Culture, earning

approximately $3,800. Defendant found jobs doing editing work for the William and Mary Quarterly, and editing microfilm. She also secured employment as an historian for the National Park Service. About a year after coming to Williamsburg, Defendant was offered a full time professorship in History at the Hampton Institute. Defendant's salary from his job was equal to or slightly more than Plaintiff's yearly salary. Moreover, Defendant continued to work part-time at the National Park Service during the school year and full time during the summer. During all of this time, the parties pooled their incomes to pay expenses. The parties moved to Yorktown, Virginia after Defendant secured her full time teaching job because it was equidistant from Hampton Institute and Plaintiff's place of employment.

In February, 1958, Plaintiff came, by himself, to the District of Columbia to accept

a full time position at the Smithsonian Institute as the Curator of the Division of Political History. Defendant, pregnant at that time with their first child, remained in Yorktown, Virginia, to fulfill her teaching obligations. The parties visited each other on weekends. The child, Harold Kitsos Washburn, called Kitsos, was born on April 26, 1958.

In August, 1958, Defendant and Kitsos moved to the District of Columbia to join Plaintiff. Shortly thereafter they purchased the house located at 307 East Capitol Street, Washington, D.C. The purchase price was $19,500 ($9,000 plus an existing first trust of $10,500 which the parties assumed). In order to purchase the house, the parties borrowed $6,000 from Plaintiff's parents recorded as a second trust on the house and used whatever savings they had thus far managed to accumulate. The evidence shows that by September, 1966 they had repaid

Plaintiff's parents approximately $2,000, at which time the note was cancelled as paid in full (See Defendant's Exhibit #17). Plaintiff also testified that his parents gave the parties a gift of an additional $5,000 toward the purchase of this property. Defendant, however, could not recall any such gift nor was there any other evidence to corroborate Plaintiff's testimony on this point.

In September 1958, Defendant started working as a lecturer in history at American University, a position she held until the spring of 1977. Defendant testified that she worked part time, lecturing six hours a week and maintaining office hours for students, although she was not paid exactly half of what a full time lecturer would have been paid. Defendant also taught at the University of Maryland from 1962 to 1964. In 1960, Defendant began selling real estate for Rhea Radin, specializing in Capitol Hill property.

She studied for and received her license as a real estate agent. Defendant worked successfully in this field until 1977. Defendant's earnings from her lecturing job as well as her real estate commissions went into the family's joint checking account, along with Plaintiff's salary from the Smithsonian, to pay for the family's expenses.

On June 29, 1962, the parties' second, and last child, Edward Alexis Washburn, was born; he is called Alexis by his family. In 1966, the parties sold their home at 307 East Capitol Street for $101,000, from which they realized $72,000 in cash. They used this money, in part, to buy in 1966 the present family home at 2338 Massachusetts Avenue, N.W., Washington, D.C. The purchase price of the house was approximately $80,000; the down payment was $17,000. The parties have held this property up to the present time;

Defendant continues to live in the house; the children consider it their family home.

In 1965, the parties purchased a farm in Westover, Maryland, consisting of seventy-five acres and a small eighteenth century farmhouse, to be used as a family recreation place. The purchase price was approximately $18,500 and the house needed major renovation including a new kitchen, bathroom and electrical and heating systems. The encumbrance on the farm was paid in full in 1978.

Both children attended private schools. Kitsos graduated from Dartmouth College in June, 1980. He is currently working in a bookstore, maintains his own home and is considering whether or not to attend graduate school. Alexis graduated first in his class from St. Alban's School for Boys and is currently in his freshman year at the University of North Carolina at Chapel Hill on a Morehead

Scholarship. This scholarship provides for all of Alexis' expenses including tuition, room and board, spending money, and summer activities.

In the summer of 1975, Plaintiff met Ms. Kathryn Cousins during the course of their employment. They began a social and sexual relationship that fall. Ms. Cousins is currently 36 and is employed at the Department of Commerce, Office of Coastal Zone Management as the Regional Manager for the North Atlantic States, earning approximately $41,000 a year. At the time of their meeting, Ms. Cousins was separated from her husband. She was subsequently divorced in December, 1977. Plaintiff testified, that, prior to his relationship with Ms. Cousins, he had had sexual relationships with approximately ten other women, married and unmarried, dating back to the middle 1960's. Defendant

had no knowledge of these affairs until her husband's deposition, taken on April 27, 1979.

In February 1976, Defendant suffered a stroke which paralyzed her right side; she was hospitalized for five weeks. Following her release from the hospital, Defendant convalesced at home. She testified that in the beginning she was unable to get around without the assistance of a wheelchair, or a walker, or a family member or friend. Plaintiff would take her for her therapy sessions three times a week. Additionally, he testified that he helped take care of the house, the children and the rental properties which they had acquired in the 60's.

According to Dr. Louis Gillespie, the physician who monitored her recovery, Defendant reached maximum recovery in March, 1977 at which time she had recovered the use of her right side. He also testified that

Defendant's blood pressure is now normal and is controlled by medication. As for residual effects of the stroke, Defendant testified that at times, particularly when tired or under stress, the right side of her face becomes painful, that her right foot becomes spastic and painful, and that her right hand becomes painful and cramps, making it difficult, at times, for her to write. Additionally, Defendant has little or no feeling in her right hand and sometimes unknowingly burns or cuts herself. Defendant acknowledged that these residual problems are affected and enhanced by weather conditions, fatigue and emotional stress. Dr. Gillespie confirmed that many of Defendant's subjective symptoms--cramping, pain, stiffness--are intensified by her emotional difficulties. Moreover, according to Dr. Gillespie, approximately 90% of Defendant's present

physical problems are caused by her current emotional difficulties brought on by the separation and divorce.

In June, 1977, the parties separated. Plaintiff testified that he had informed his wife several months earlier of his intention to leave. According to Plaintiff, the marriage had disintegrated years earlier, but he felt he could not leave at that time because the children were too young.

After moving out of the family home on Massachusetts Avenue, Plaintiff stayed at the Cosmos Club for several days and then moved in with Ms. Cousins at her home on Dent Place, N.W., in the District of Columbia. Their usual routine was to stay in the city during the week and then spend the weekend at the parties' farm in Westover, Maryland. Plaintiff initially paid Ms. Cousins $300 a month for rent and expenses at Dent Place; this was

increased to $500 a month in November, 1977. Plaintiff and Ms. Cousins testified that those monthly payments were not for food and expenses but rather rental for office space for Plaintiff and storage for his books. The Court notes that neither Plaintiff nor Ms. Cousins were entirely candid on this issue, given the somewhat conflicting testimony in their depositions. The indisputable fact, however, is that Plaintiff did make monthly payments of $300 and then $500 to Ms. Cousins while the parties were living together at Dent Place.

In April, 1979, Ms. Cousins purchased a twenty-acre farm, Clifton, located in Maryland, near Plaintiff's farm. Clifton is a twenty-acre piece of land with a large, brick house, swimming pool, tennis court, and two smaller houses, one of which is being rented. The parties then began spending their week-

ends at Clifton rather than the Washburn farm. In late July, 1980, Ms. Cousins sold her home at Dent Place because she had decided to make Clifton her permanent home and could not afford the expense and upkeep of two large residences.

Plaintiff and Ms. Cousins have co-signed several financial obligations for each other since Plaintiff's separation. For example, in December, 1978, Plaintiff co-signed the second mortgage taken on Ms. Cousins' Dent Place home; and in April, 1979 he co-signed the second mortgage taken on Clifton. Plaintiff never made any payments under these obligations, all of which have been repaid; nor has he received any interest on any of the property involved. He did receive $5,000 from the proceeds of the second trust on Dent Place. Plaintiff and Ms. Cousins have an informal agreement regarding repayment of

of this loan. Ms. Cousins has co-signed two loans of $5,000 each that Plaintiff made from his credit union, one in December, 1978, the other in November, 1980. Plaintiff used the $5,000 he received from Ms. Cousins to repay the first loan; the second loan has not yet been repaid. Ms. Cousins has not made any payments directly to the credit union for either of these loans. At present, Plaintiff and Ms. Cousins do not jointly own any property nor have they co-mingled any of their funds. Plaintiff does not make monthly payments to Ms. Cousins for expenses at Clifton, although they do share the cost of food and use the property every weekend. Plaintiff has the use of Ms. Cousins' car and, therefore, does contribute to automobile expenses.

At present, the parties have been married to each other for almost thirty years. During all of this time, Defendant

was responsible for caring for the two children, maintaining the home, and managing the parties' extensive social life, in addition to her professional activities. The Court concludes that the quality of this marriage had disintegrated over the years. While detailed reasons for this deterioration in the marital relationship were not presented to the Court, there is no question about Plaintiff's misconduct during the marriage, namely his numerous adulterous affairs and his relationship with Ms. Cousins which began before the parties separated.[1] The Court finds that the dissolution of the marriage was precipitated by Plaintiff's leaving the marital home and his living with Ms. Cousins in an adulterous relationship. Although these divorce proceedings were initiated contrary to Defendant's wishes, the Court finds that the parties have lived separate and apart, without

cohabitation, since June 1977 and there is absolutely no hope of reconciliation, despite Defendant's intense desire therefor.

Plaintiff is now 56 years old. Since August, 1980 he has been living in an efficiency apartment at 1111 30th Street, N.W. Ms. Cousins stays with him at this apartment during the week although she makes no contribution toward rent or utilities. Plaintiff testified that he wishes to marry Ms. Cousins after his divorce is granted. Ms. Cousins, however, denied any such intention on her part, indicating that marriage to Plaintiff caused her concern for emotional, and financial reasons. With respect to his career, Plaintiff has been very successful, both financially and in less tangible respects such as status within his field and scholarship. He has written articles and a book, and has lectured widely. He has risen

steadily in the hierarchy of the Smithsonian, an institution of vast intellectual prestige. His prospects for the future are excellent. There was no suggestion that he is anything but in good physical health. Economically and professionally, Mr. Washburn has a well-paying, secure job, at a nationally known institution where he is undoubtedly regarded as an expert in his field of American history and civilization. At retirement, he will be eligible to receive two pensions, one from the Smithsonian and one from the Marine Corps. Socially, Plaintiff is an attractive, cultured man, who is currently involved in an intimate relationship with another woman. Even if Plaintiff's relationship should come to an end at some future time, the social realities of our society indicate that Plaintiff would not lack any opportunity for other such relationships.

Defendant's present and future situation is not as positive or promising. Since the separation, she has continued living in the family home on Massachusetts Avenue. Now 57, her physical health is impaired as a result of her stroke. Moreover, she is clearly in great emotional distress due to the divorce and separation. Defendant was examined by Dr. Lawrence Cove of the Forensic Psychiatry Division in March,1980, pursuant to Court order, due to her emotional inability to prepare for and go forward in this proceeding. In his report, Dr. Cove found Defendant to be suffering from a depression, more precisely classified as a "mourning reaction," brought on by the break-up of her marriage and threatened permanent loss of her husband. Defendant's emotional distress was further complicated by the death of her mother about two years ago and the then impending, now actual, departure of her youngest child for

college. At trial, Dr. Cove testified that although the divorce would cause further depression by confirming the loss, Defendant would not really begin to resolve her emotional difficulties until the divorce, i.e., loss, was completed. Dr. Cove stated that Defendant's reaction to the marital breakup was in no way volitional. He also indicated the possibility that Defendant's sense of loss might be increased by the loss of the rental properties acquired by the parties during the marriage. Dr. Cove was unable to predict Defendant's emotional recovery given all of the complicated and unpredictable factors such as the degree of her anger, the impact of her age and the residual effects of her stroke, the future unfolding of events and circumstances, as well as the opportunities available to find new objects in which to make emotional investments.

Dr. Cove testified that Defendant will require a great deal of treatment, including psychotherapy and medication. At this point, the Defendant is unable to work because of her depression, weeps a great deal of the time, and finds herself unable to engage in any meaningful activity. This situation is particularly difficult for Defendant to bear given the sharp contrast with her former self: she was a highly competent and intelligent business woman and university professor; and she was a cultured, sophisticated, and charming social companion who had mixed easily in both diplomatic and academic circles.

As for Defendant's financial situation, she has done much less well economically than Plaintiff, even though they both began at the same advantageous point in life, as graduate students at Harvard University. Although she

has worked her entire married life, as professor, as real estate saleswoman, as mother, as homemaker, and as social companion to an ambitious spouse, she has not acquired the same professional status as Plaintiff or even the financial security he will enjoy at retirement. Moreover, she is not currently working, and her physical and emotional difficulties may preclude her from ever being as productive as she was. The Court concludes, therefore, that Defendant's future, from both a financial and personal point of view shall be a difficult one, at best.

B. The Marital Property

One of the central issues in dispute in this proceeding is the distribution of the property the parties acquired during the course of their marriage. The first piece of property at issue is the marital home

located at 2338 Massachusetts Avenue, N.W., purchased in 1966. As stated supra, the parties made the down payment from the proceeds realized from the sale of their home at 307 East Capitol Street. Until the time of separation, the parties made the mortgage payments out of joint funds; since the separation, Defendant has been solely responsible for these payments.

The property consists of a large, three and one half story, three bedroom house located in the Embassy Row section of the city. The purchase price in 1966 was $80,000, and the encumbrance presently remaining on the property is $41,968.83. Plaintiff offered the expert testimony of Mr. Edgar Myers, a licensed real estate appraiser in the District of Columbia to establish the value of the house at $350,000. The court notes that the evidence offered to establish the value of all the other properties of the parties

located in the District of Columbia was the District's tax assessment for the 1980 fiscal year. See Deft. Exhibit #20. The Plaintiff had no objection to the use of this method of evaluation, even though he had had all of the properties appraised. Given the necessity of consistency in making value determinations in proceedings such as these, as well as the inherent unfairness of using one method of valuation for one property and another for all of the others, the Court will not rely on the appraisal testimony offered by Plaintiff. Accordingly, the Court finds the value of the marital home to be that contained in the D.C. Government tax assessment records, which is $187,500. The equity remaining in the family home, therefore is $145,531.17.

The other family home at issue is the farm in Westover, Maryland, purchased by the parties in 1965. The property consists of

approximately 75 acres of land with a small, eighteenth century house. The purchase price was $18,500. In order to purchase the property, the parties took out a first trust of $12,000, in part using funds from the refinancing of another property. During the years, the parties and their children did work on the house, which needed substantial renovation. The farm was used as a family recreation place. Until the time of the separation, the parties made the mortgage payments from joint funds. Since then, Plaintiff took responsibility for these mortgage payments; the mortgage was paid in full in 1978. The Maryland tax assessment records value the farmland at $16,000. This is based on its use as a farm rather than its market value which would be considerably higher. (See Deft. Ex #25) Both parties agree that the market value of the land and house is between $100,000 and $125,000, and the

Court credits this testimony. The farm is currently being rented; Plaintiff receives yearly income of $965 after expenses from these rentals.

The next group of properties consists of the seven rental properties in the Capitol Hill area of the District of Columbia, purchased during the course of the marriage. The first of these properties, 635 South Carolina Avenue, S.E. was purchased in 1960. At that time, Defendant and two other buyers purchased, as a package, this house as well as the houses adjoining on either side. Defendant used her real estate commissions and a loan from a friend of her mother to meet her share of the downpayment. The total purchase price for all three houses was approximately $24,000; Defendant's share was $8,300. Shortly thereafter, one of the original buyers sold his interest and Defendant took sole interest to 635 South Carolina Avenue.

This property is titled solely in Defendant's name. Joint funds, however, were used in making the mortgage payments as well as for some of the repairs. The assessed value of the property is $97,828.[2] There is an outstanding encumbrance of $4,891.34; the equity in the house, therefore, is $92,936.66. This property is fully restored. It is a three bedroom house and rents as one unit. The current monthly rent is $468, and the net income per month, after expenses,[3] is approximately $164.[4]

The second property acquired was 643 Massachusetts Avenue, N.E. Defendant purchased this home in 1961, again using commissions from real estate sales and loans from a friend of her mother's to make the downpayment. The purchase price was $12,600. The current value of the property is $103,767. The outstanding encumbrance is $4,579.52, leaving equity of $99,187.48.

The property is a fully restored, three and a half bedroom house. It rents as one unit, the monthly rental having recently been raised from $631 to $655, leaving a net income of approximately $180 to $200. The Court notes that the real estate taxes on this property are paid by the lending institution holding the mortgage, rather than the parties. This property is also titled solely in Defendant's name although joint funds were used for mortgage payments and repairs.

The remaining five properties were all acquired by the mid-1960s. The only other property titled in Defendant's name, is a one-third interest in back-to-back properties located at 641 Independence Avenue, S.E. and 644 North Carolina Avenue, S.E. Defendant's share of the purchase price was $5,666. Her one-third of the assessed value is $52,217.33. One-third of the encumbrance is $17,352.35. Thus, Defendant has equity in the property of

$34,864.18. Defendant is not involved in the management of this property; it is handled by the other co-owners. Her share of the rental income, after expenses, is approximately $6.00

As for the four, jointly titled properties, 126-7th Street, S.E. was purchased in 1961; the purchase price was between $16,000 and $16,500. The current assessed value is $100,000. With a $4,891.34 encumbrance still outstanding, the equity in the property is $95,108.66. This is a restored, five bedroom house which rents as a single unit. The current monthly rent is $841; the net income after expenses is approximately $422.

The property at 723 Massachusetts Avenue, N.E. was purchased in 1962; the purchase price was $16,500. The current assessed value is $127,143. There is an outstanding encumbrance of $33,787.94, leaving equity of

$93,355.06. This property is also a restored, five bedroom house. It rents as two rental units for a total of $815 a month; the net income is approximately $66 after expenses.

606 East Capitol Street was also purchased in 1962, for $21,000. The current assessed value of this property is $141,746. The outstanding encumbrance is only $787.27; the equity in this property is $140,958.73, the highest equity in any of the Washburn properties. As with 653 Massachusetts Avenue, N.E., no real estate taxes are due on 606 East Capitol; the taxes are paid by the lending institution that holds the mortgage. Since only the upstairs portion of this property is restored, it is the only portion of this otherwise four bedroom house which is being rented. The monthly rental is $490, which nets monthly income of approximately $20.

The last piece of real estate in dispute is the house at 327 East Capitol Street. This house was purchased in 1966, the purchase price was $36,660. The assessed value of the property is now $139,733. The parties have equity of $137,549.39 in this property because the outstanding encumbrance is $2,183.61. This house has five bedrooms and is fully restored. There are two rental units for a total monthly rent of $785. After expenses, the net income from this property is somewhere between $75 and $100.

It is conceded that Defendant was responsible for the acquisition of all these properties. With her expertise and acumen in real estate, she was able to locate the properties, and arrange the financing necessary for purchase and restoration. It is highly unlikely, as Plaintiff himself conceded, that he would have accumulated these

properties without Defendant's skill and sagacity.

Purchases were made and restoration was accomplished either through loans, refinancing of other properties, or with the parties' joint funds derived from their respective salaries and Defendant's real estate commissions. Some of these properties are furnished with items bought from joint funds or income from the properties. The Court credits Plaintiff's testimony that he did some of the physical labor in repairing and restoring these properties. On occasion, usually in Defendant's absence or during her illness, Plaintiff managed them. However, as a general matter, Plaintiff is not familiar with the financial intricacies of buying, selling, remodeling, or renting real estate. Additionally, the Court finds that joint funds went into the purchase and restoration of all of these properties, even those titled solely

in Defendant's name. Moreover, the parties concede that all of this property is jointly held, marital property.

The parties have also acquired a substantial amount of personal property during the course of their marriage. Prior to trial, Plaintiff had the furnishings and art work in the marital home appraised by Ms. Maureen Taylor. Ms. Taylor has been an art and antique dealer and appraiser for ten years and is currently associated with the Calvert Gallery of the District of Columbia. She testified, as part of Plaintiff's case, that the appraised value of the furnishings and art work was $63,404.50. If sold at auction, however, the property would only be worth $41,000. Ms. Taylor stated, however, that her firm would guarantee $63,000 for the property she appraised if it was given to them to sell. Defendant testified that the value of the furnishings and the art work was

approximately $30,000, based on information given to her by friends with knowledge in valuing art and furnishings. The Court finds the value of the parties' furnishings and art work to be $63,000. The parties also own two automobiles, a 1973 Mercury Capri, worth only a few hundred dollars which Defendant drives, and a 1966 Peugeot, which is currently non-operational but capable of being repaired, which Plaintiff desires. Both of these automobiles are titled in Defendant's name alone, although bought with joint funds. The parties also own some of the furniture in the rental properties; the value of this furniture is indeterminable, and the parties agreed that it should be left wherever it currently is.

Finally, Defendant owns family property in Greece. One piece of property is a small house on the island of Hydra, given to Defendant as a gift by her mother in 1960.

Plaintiff testified that this house was intended as a belated wedding gift. There was no other evidence offered to corroborate this testimony, nor is Plaintiff's name on the title to the property. The property is currently being rented for 2000 drachmas a month for a three month period.[5] There is no reliable evidence as to the value of this property; Defendant estimated the value at $8,000 to $11,000.

The second piece of property is a beachfront compound of three houses in Glyfada, a suburb of Athens. This property was originally owned by Defendant's mother and aunt. In 1974-75, the parties purchased the aunt's interest. Defendant is sole heir of her mother's estate and will thus own the entire property once her mother's estate is settled. One of the houses as well as one of the floors of the main house is currently being rented for about 3000 drachmas and

4000 drachmas a month, respectively. The rentals are handled by Defendant's attorney in Greece, and they are paid directly to Defendant's aunt. Defendant herself receives no income from these properties.

On the issues of market value of the Glyfada property, Plaintiff offered the testimony of Ms. Ariste N. Mimikos, the general manager of a realty company in Greece. Ms. Mimikos, a U.S. citizen, is a Greek national and has lived in Glyfada for the past five years. She testified that she has done approximately one hundred estimations of value of real property, although she is not licensed as an appraiser would be in this country. Additionally, at the time of the hearing, she had only had her real estate broker's license for a few weeks. Ms. Mimikos testified that the fair market value of the property was 50,625,000 drachmas, or $1,012,500, based on the fact that the

property was 1687.5 meters square in dimension, and would sell for 30,000 drachmas per square meter. Ms. Mimikos' 30,000 drachma figure came from a comparable sale in the Glyfada area.

The Court had considerable difficulty with affording this testimony any great weight. Ms. Mimikos based her determination of value on the recent sale of an allegedly similar parcel of land. These two parcels, however, are in no way comparable. Defendant's property is residental and located in a residential area. The other piece of property was in a more populated area, about ten minutes drive away. Moreover, that property was an apartment building, not a private residence. In addition, Ms. Mimikos had only seen the tax assessment figure for the sale, and did not even know the sale price which had actually been paid.

Despite any use of joint funds toward these properties, the Court concludes that these Greek properties were a gift to Defendant from her family and therefore are sole, not marital, property. Moreover, Plaintiff has waived any interest in the property. Finally, the Court concludes that these properties are essentially of no monetary value to the Defendant. She testified that she has no intention of selling these properties, and intends to hold them for the use of her sons who visit Greece regularly and for other family members. Most significantly, even if she were to sell the property, she would not be able to take the proceeds out of Greece. For as Ms. Mimikos testified on cross-examination, currency is not freely convertible in Greece, and there is a limit placed on the amount of currency one can take out of Greece. So, for all practical purposes, the Defendant

cannot liquidate the properties so as to convert them to U.S. dollars.

C. Financial Overview

Since the separation, Defendant has lived in difficult financial circumstances. Although she returned to teaching at American University and selling real estate after her stroke, Defendant stopped working completely around the time Plaintiff left the home. Defendant's only sources of income therefore, are the net monthly rentals of approximately $950 she receives from the property and $500 a month pendente lite support that Plaintiff was ordered to pay in October, 1979.

According to Defendant's financial statement, her total monthly expenses are $2,651.84, which includes the monthly mortgage payment on the family home, monthly payments for property taxes, and monthly medical expenses of $520.

After review of these expenses, the Court concludes that the monthly expense of $300 for food should be reduced by $100, and the total amount of $560 for recreation, vacation and miscellaneous should be reduced by $200. The Court notes, without making any reduction, that Defendant's medical expenses may become lower as she begins to resolve her emotional difficulties; moreover, her figures do not reflect the payment of health insurance benefits. Since Alexis is currently going to school on a full scholarship, which pays for all of his expenses, and he works to cover other personal expenses, and his father contributes some money to him, the Court will further reduce Defendant's expenses by $110, the monthly amount allocated for his clothing and allowance. Finally, the Court will make an overall reduction of $40 a month for other expenses which the Court finds to be somewhat high, such as clothing and

various expenses for Defendant's automobile. The Court finds, therefore, that Defendant's current reasonable, credible and proper monthly expenses are approximately $2,200.

In addition, Defendant has substantial liabilities. As her financial statement indicates, Defendant owes $1,000 in income taxes, approximately $10,000 to $11,000 in real estate taxes, and $4,420 in medical expenses for psychotherapeutic treatment. Defendant also lists $15,500 in personal debts resulting from repayment of a 1977 joint tax debt.

In 1977, the parties filed a joint tax return. The taxes due and owing were approximately $14,000. Because of income received from the rental property, Defendant's teaching salary and real estate commissions, and Plaintiff's honoraria, not enough had been withheld from Plaintiff's salary to cover their joint tax liability.[6] In 1978, the parties

attempted to find a means to pay this debt. Defendant suggested that one of the rental properties could be refinanced without undue hardship. Plaintiff rejected this suggestion; he explained that he had been informed by Defendant that the payments resulting from this refinancing would be his responsibility, and he did not have the financial means to undertake any additional liabilities. Consequently, Plaintiff proposed that one of the properties be sold to meet the tax debt.[7] Despite lengthy efforts of counsel, the parties were not able to resolve this problem and, inevitably, the Internal Revenue Service seized the property at 723 Massachusetts Avenue, N.E. to have it sold to repay the taxes. Defendant, not wishing to have the property sold, came to agreement with the IRS whereby she would pay them a lump sum of $14,000 to avoid having the property sold.

Defendant then borrowed the $14,000 from a number of her personal friends. The $15,500 represents the remaining indebtedness, including interest, incurred by Defendant to pay the parties' joint 1977 tax debt.

Plaintiff's financial situation is much less threatening. As director of the Office of American Studies at the Smithsonian Institution, his gross yearly salary is approximately $51,000. In addition, he estimates that he will earn approximately $3,000[8] this year from honoraria, as well as net income from rental of the farm of approximately $965. According to his financial statement, Plaintiff's net disposable income per month is approximately $2,200.[9]

As for expenses, Plaintiff lists total expenses of $2,185.00 per month, including $595 for rent, $950 for taxes owed in 1980 and $125 for allowance for his children. The Court notes that in prior years, Plaintiff

contributed substantial amounts towards his sons' tuition and expenses. However, he is no longer legally obligated to do so. Kitsos is no longer a minor, nor is he in school and in fact is currently employed. While Plaintiff may well wish to contribute financially toward any graduate education Kitsos pursues, such payments would be made voluntarily. As for Alexis, his Morehead scholarship to the University of North Carolina pays for tuition, room and board, expenses and even his summers. Plaintiff, therefore, no longer has any educational expenses for either of his children. Since October 1979, Plaintiff has been paying $500 a month pendente lite alimony, pursuant to Court order, and is totally current in those payments. Plaintiff's liabilities are $11,000 owed for his 1980 taxes, both federal and in the District of Columbia, $1,500 for consumer credit purchases, $3,300 for legal costs and fees, and $4,787.55 still outstanding

on the loan taken with the Smithsonian credit union. From his testimony, he also apparently owes $5,000 to Ms. Cousins.

III. Resolution of the Issues

A. Introduction

Throughout the course of this proceeding, Defendant's position on the issues has been quite clear. She seeks an award of all eight properties in the District of Columbia; Plaintiff could have the farm. Additionally, Defendant requests monthly alimony of $1,500 to $2,000 a month. She contends through counsel that such a determination is necessary for her to have sufficient income on which to live. Moreover, as the person chiefly responsible for the acquisition of all of the District properties, Defendant claims that she is rightly entitled to have them awarded to her.

Moreover, Defendant seeks $25,000 in legal fees resulting from this proceeding.

Plaintiff is equally clear as to his position. Since all of the property is joint property, Plaintiff seeks an equal division of the properties. Specifically, he asks the Court to award him title to 327 East Capitol Street, to be used as his future residence, 606 East Capitol Street, 723 Massachusetts Avenue, N.E., and the farm in Westover, Maryland. In addition, Plaintiff asks that he be awarded all of the personalty listed on Plaintiff's Exhibit #3 as well as the 1966 Peugeot. Moreover, Plaintiff is opposed to paying alimony to Defendant. He contends, through counsel, that Plaintiff could and should sell the properties awarded to her by this Court, including the family home, reinvest the money in assets such as tax exempt municipal bonds that would produce far greater income, thereby realizing

sufficient income to live without the necessity of alimony. In support of this position the Plaintiff offered as part of its rebuttal case the testimony of Mr. Perry Sandler, a licensed public accountant in the State of Maryland.[10] Mr. Sandler's testimony consisted of a plan whereby Defendant could sell various properties, receive the proceeds over a three year period and reinvest those proceeds in municipal bonds. The entire plan was far too unrealistic, speculative, and unworkable, given the way real estate is, in fact, sold for the Court to be able to consider, let alone rely on it in making its final determinations of how to distribute the property and whether to award alimony. Cf. Skiff v. Skiff, D.C. App., 277 A.2d 284 (1971), discussed infra.

B. Distribution of Property and Award of Alimony

Under Section 16-910(b) of the D.C. Code, (Supp. 1978) the Court has the authority to distribute all property "accumulated during the marriage, regardless of whether title is held individually or by the parties in a form of joint tenancy or tenancy by the entireties." This statutory language "reflects and supports the reality that when property is so acquired during a marriage, however it is titled, both spouses reasonably may expect to have an interest therein which a court could consider in case of divorce." Hemily v. Hemily, D.C. App., 403 A.2d 1139, 1142 (1979). The Court, therefore, has the authority to distribute all of the properties in D.C. and Maryland acquired by the parties during their marriage, even those titled solely in Defendant's name or purchased in

part by Defendant's real estate commissions, since the clear intention of the parties was to treat those properties as marital property and to regard that income as joint income.

Section 16-910(b) directs the Court to distribute marital property

> in a manner that is equitable, just and reasonable, after considering all relevant factors including, but not limited to: the duration of the marriage, any prior marriage of either party, the age, health, occupation, amount and sources of income, vocational skills, employability, assets, debts, and needs of each of the parties, provisions for the custody of minor children, whether the distribution is in lieu of or in addition to maintenance, and the opportunity of each for future acquisition of assets and income. The court shall also consider each party's contribution to the acquisition, preservation, appreciation, dissipation or depreciation in value of the assets subject to distribution under this subsection, and each party's contribution as a homemaker or to the family unit.

Moreover, the court has wide discretion in applying this statutory provision. Benvenuto v. Benvenuto, D.C. App., 398 A.2d 795, 797 (1978).

As to awards of alimony, the Court may require such payments "if it seems just and proper." D.C. Code # 16-913 (Supp. 1978). No fixed rule or formula exists in determining an award of alimony; the Court must make its determination based on the particular facts of each case. McEachnie v. McEachnie, D.C. App., 216 A.2d 169, 1970 (1966). Among the factors to be considered are the duration of the marriage; the respective ages and health of the parties; their respective financial positions; the spouses contribution to the support of the family and to property ownership; the needs of the spouse requesting alimony; the ability of the other spouse to pay; and the interest of society in preventing a spouse from becoming a public charge. McEachnie v. McEachnie, supra; Sheridan v. Sheridan, D.C. App., 202 A.2d 653, 655 (1964). Alimony is not to be awarded either as a penalty for the misconduct of one spouse or

as solace for the other spouse because of such misconduct or abandonment. McEachnie v. McEachnie, supra.

In the present case, the parties have been married for almost thirty years. They married while both were at Harvard University doing graduate work. Yet despite this auspicious beginning for both parties, Plaintiff's professional career has flourished while Defendant's has floundered. Over those thirty years, Plaintiff contributed his salary, and perhaps the benefits of his professional status to the family. Defendant's contribution was no less substantial. She cared for the children, and managed their home and their undoubtedly rich, active social life. Defendant also worked outside the home during all these years, contributing her income to joint funds, thereby raising the standard of living and position in life the parties enjoyed. Additionally, through

her real estate experience and acumen, aided by her income, she acquired for the parties a package of real estate holdings that inured to the financial benefit of the entire family. Moreover, these properties would not have been acquired without the Defendant. As for the disintegration of this marriage, both parties undoubtedly played a part in the deterioration of their relationship. The final disruption, however, resulted from Plaintiff's adulteries and his departure from the marital home.

As the parties presently stand before the Court, their life situations are widely disparate. At 56, Plaintiff is apparently in good health; his professional and social prospects are good. Defendant, at 57, is in a precarious situation. Although physically recovered from her stroke, it is clear from the medical testimony that she still suffers from residual effects. Moreover, Defendant's

coping mechanisms and flexibility may well have been permanently impaired by her physical illness. As for her emotional health, Defendant is clearly in great distress and depression. Not only will the recovery process require a great deal of time, including psychotherapy and medication, but this recovery process cannot even begin until this proceeding is complete. While this Court believes that Defendant is a woman with the inner strength, drive and spirit to resume a meaningful, productive life, such beliefs are purely speculative and thus, cannot provide the basis for this Court's final order.

As for the parties' respective economic positions, Plaintiff again is in a more secure situation. He currently earns $51,000 a year from the Smithsonian plus any additional income from honoraria and consulting. He receives the income from the farm, and as noted supra, he has two pensions to look

forward to upon retirement. In assessing Plaintiff's prospective financial position, the Court has totally discounted, contrary to the vigorous arguments of Defendant's counsel,[11] his life with Ms. Cousins, regardless of whether she testified truthfully about her future marital intentions. Certainly her testimony was plausible. The Court, however, cannot hinge its determinations on what their life might be like together. That would be pure speculation based on many uncontrollable variables. The Court has found that Plaintiff has disposable monthly income of approximately $2,200 per month, and has no obligation to pay support for either of his children, one of whom is emancipated, the other of whom is attending college on a scholarship that pays all expenses.

Defendant now receives $500 a month pendente lite alimony and from $935 to $980 a

month from the rental properties. She is not currently working. While she may begin to work again at some future date, Defendant's emotional distress and resulting physical difficulties make it unlikely that she will return to the work force in the near future. Even if she does, she cannot look forward to earning the kind of salary Plaintiff earns. While the Court notes that the rental properties are substantially underfinanced and underrented, predicting the amount of financing or rental income that could be derived from this property in today's fluctuating economy would be an act of pure speculation. This is no more proper for the Court to consider in making its determination than would it have been proper to consider Plaintiff's future lifestyle with Ms. Cousins.[12] Finally, while Defendant's properties in Glyfada and Hydra may make her a wealthy woman in Greece, the Court has already found

that these properties are of no financial worth to her in the United States. The Court cannot consider these properties, therefore, when determining Defendant's need for alimony or the distribution of the marital property. After consideration of all of the above the Court concludes that Plaintiff has the financial resources to contribute to Defendant's support and that it would be "just and proper" to award alimony in this case.

The amount of alimony Plaintiff will be required to pay is inextricably intertwined with the Court's determination of how the property in this case is distributed, since that will impact on the amount of income Defendant will receive. Moreover, in distributing marital property, the Court can consider whether such distribution "is in lieu of or in addition to maintenance." D.C. Code # 16-910(b) (Supp. 1978).

Based on all of the factors this Court must consider, in light of the factual circumstances of this case, the Court has concluded that Defendant shall be awarded sole right title and interest to the marital home, located at 2338 Massachusetts Avenue. Such an award is proper despite Plaintiff's financial contribution to the purchase and restoration of this house. Defendant has lived in this house for the last fourteen years; she considers this to be her home as well as that of Alexis, her younger son, who is still in college; and Defendant has been solely responsible for the mortgage payments since the separation. As our Court of Appeals stated in Campbell v. Campbell, D.C. App., 353 A.2d 276, 279 (1976):

> (W)here jointly held property is at stake, it is the rule in this jurisdiction that financial contribution is not the sole, or necessarily even the determinative, criterion in resolving such questions. (citations omitted).

> The issue is to be determined on a case by case basis, according to the totality of the circumstances. To be taken into account are factors such as the relative abilities of the parties to shelter themselves (and their children) adequately, and each party's contributions to the maintenance of the household, in addition to a simple accounting of the parties' respective monetary investments.

See also Grasty v. Grasty, D.C. App., 302 A.2d 218 (1973) (award of marital home solely to wife where she had contributed to purchase from own funds, had been employed regularly during marriage for eight years until birth of second child and house was still home for the parties' children); Lundregan v. Lundregan, D.C. App., 176 A.2d 790 (1962) (sole title to marital home awarded to husband, despite wife's financial contribution, where he continued to live in the home and pay the mortgage installments).

Additionally, the Court shall award to Defendant sole right, title and interest in the following rental properties: 327 East Capitol Street; 643 Massachusetts Avenue, N.E.; 723 Massachusetts Avenue, N.E.; 635 South Carolina Avenue, S.E.; 126 11th Street, S.E.; and the back to back property at 641 Independence Avenue, S.E.; and 644 North Carolina Avenue, S.E. The Court awards to Plaintiff, therefore, sole right, title and interest to the farm in Westover, Maryland, and the property located at 606 East Capitol Street. The Court notes that the farm property has no encumbrance upon it. Moreover, 606 East Capitol is the property with the highest amount of equity, and for which there are no property taxes due and owing.

During the course of the trial, and in supplemental memoranda, counsel for both parties raised the issue of the impact of United States v. Davis, 370 U.S. 65 (1962) on

the distribution of property in this case. In Davis, a Delaware husband had transferred solely owned appreciated property to his wife under a settlement agreement executed prior to their divorce. In exchange for this property, the wife waived any and all claims and rights she had against her husband, including any marital rights or rights of intestacy. 370 U.S. at 66-67. The Supreme Court, looking to Delaware law, determined that the property in question belonged solely to the husband, Id. at 66, and that the inchoate rights which the wife had in the property did not "even remotely reach the dignity of co-ownership." Id. at 70. The Supreme Court thus concluded that the transfer of the property was a taxable event subject to the imposition of tax on the gain. Id. at 71.

After extensive research on this issue in this and other jurisdictions, the Court

concludes that Davis does not apply to the distribution of property ordered by the Court in this case.[13] Our Court of Appeals has never ruled on the issue, nor are there any cases from other jurisdictions, or rulings from the Internal Revenue Service that are squarely on point. Moreover, the Davis case is distinguishable from the instant proceeding on several grounds.

Under applicable state law, specifically, D.C. Code # 16-910(b) (Supp. V. 1978), the property at issue is marital property in which both parties have a presently existing property interest. Each party has an ownership interest at stake; each party contributed to the purchase of the property and shared the income and expenses resulting therefrom. Furthermore, with the exception of three of the properties, this property is, in fact, jointly titled. As for those three properties titled solely in Defendant's name,

the Court has found, pursuant to #16-910(b), that this was marital property as well. The parties do not contest this. Therefore, this case is distinguishable from Davis, where the property was, under state law, solely owned by the husband and the wife's sole interest in the property derived from inchoate marital rights.

Furthermore, in Davis the parties had entered into a voluntary separation agreement, prior to the divorce, in which the wife had waived any claims she had against her husband, including, presumably, her right to alimony. This is not so in the instant proceeding. No voluntary separation agreement was entered into; this Court has ordered the distribution of the property. Moreover, Defendant has not waived any of her claims, and, in fact, is specifically seeking alimony from the Plaintiff. Nor is the property being distributed in satisfaction of Plaintiff's obligation to

pay alimony. The Court, not the parties, shall determine what alimony should be awarded. For all of these reasons, therefore, the Court concludes that the distribution of the marital property, as ordered by this Court, is not a taxable event to either party, but merely the non-taxable division of property between co-owners.[14]

Having awarded Defendant the marital home and six of the seven rental properties, the Court must now determine the amount of the alimony award. Prior to the distribution of property, Defendant received monthly income of approximately $950 from the property. Once title to 606 East Capitol Street is transferred to Plaintiff, Defendant's monthly rental income will be reduced by about $20.00. With monthly expenses of $2,200, Defendant requires additional monthly income of $1,270. Plaintiff's monthly disposable income is approximately $2,200.

Taking into account all of the necessary factors, the Court concludes that it would be just, proper and reasonable for Plaintiff to make monthly alimony payments of $1,000.[15] At such time as Defendant returns to work, regardless of what kind, she shall notify Plaintiff of this change in her financial status. Plaintiff may then take whatever actions he deems appropriate.

C. The Personalty and Outstanding "Joint" Liabilities

As stated in the Introduction, Plaintiff has asked the Court to award him all of the items of personalty listed in his Exhibit #3. Defendant does not contest such an award with the exception of four pieces of personal property, specifically the English gate leg table, the William and Mary chest of drawers, early 18th century, and the four Queen Anne style dining chairs. Defendant testified that she purchased these four

pieces of furniture either with her real estate commissions or with help from her mother. The Court credits Defendant's testimony as to these four pieces of furniture, and, accordingly, awards Plaintiff all of the items of personalty listed in his Exhibit #3, except for those four items listed above. As requested, Plaintiff shall be awarded title to the 1966 Peugeot; Defendant will retain possession of the 1973 Capri.

As for the unpaid real estate taxes on the real property, each party is responsible for the taxes due on their own property, that is, the property awarded them by this Court. Plaintiff is responsible for his share of the taxes due from the 1977 income tax return the parties filed jointly. Since the income in question was joint income and the withholding taken from Plaintiff's salary that year impacted on the amount of disposable income available to both parties, the Court finds

that the $15,500 owed by Defendant, as loans taken to pay the taxes, must be shared equally. Plaintiff therefore is responsible for paying $7,750 of that debt. The Court notes that the parties could undoubtedly refinance their respective properties to repay these debts.

Defendant also owes $4,420 in medical expenses. The testimony regarding these medical debts was highly confusing. Apparently, Defendant's medical expenses are covered by Plaintiff's health insurance. Plaintiff testified that he turned these bills over to his insurance company, and even instructed the doctors to submit their bills directly to the insurance company. Yet, for inexplicable reasons, these bills remain unpaid. Given the insufficiency of the record on this issue, the Court can make no findings as to how and by whom these medical expenses should be paid. As for Defendant's future medical

expenses, she has a specified period of time after the entry of the divorce decree to convert her coverage under Plaintiff's insurance to coverage for herself without being subject to an exclusion for prior existing illnesses. Defendant will therefore have adequate insurance following the divorce.

D. Attorney's Fees

The award of counsel fees in domestic relations proceedings is discretionary with the trial court, and in making such awards, the Court is not bound by "any mathematical computation of time consumed multiplied by some hourly rate." Ritz v. Ritz, D.C. App., 197 A.2d 155, 157 (1964). Among the factors to be considered are the nature and quality of the services performed, the need for such services, the results obtained, the needs of the party requesting the attorney's fees and the ability of the other party to pay.

Ritz v. Ritz, supra; Clark v. Clark, D.C. App., 144 A.2d 919, 921 (1958).

Counsel for Defendant has requested $25,000 in attorney's fees. His affidavit shows that he expended 229.35 hours over a period of almost three years, at an hourly rate of $100 to $125. The Court does not question the number of hours counsel spent on this very difficult case. Counsel's services were excellent and the results obtained for his client were in large measure successful. Nonethess, $25,000 is approximately one-half of Plaintiff's yearly salary, and he will have his own attorney's costs to pay. In addition, he has received a far smaller share of the marital assets than the Defendant, for all the reasons outlined above. Moreover, a significant portion of the delay in having this case resolved was caused by Plaintiff's [sic] resistance to the divorce for her own emotional reasons, rather than

on valid legal grounds. Nor was Defendant amenable to settlement of the case. Accordingly, the Court will assess Plaintiff attorney's fees in the amount of $7,500.

WHEREFORE, it is hereby this 26th day of March, 1981,

ORDERED: That,

1. Plaintiff shall be awarded a judgment of absolute divorce from the Defendant on the grounds of separation without cohabitation for more than one year: PROVIDED, HOWEVER, that this judgment shall not be effective to dissolve the bonds of matrimony until the time for taking an appeal has expired, or until the final disposition of any appeal so taken.

2. Plaintiff shall be awarded sole right, title, and interest in the property located at 606 East Capitol Street, N.E., Washington, D.C., and the farm located in Westover, Maryland. Defendant shall execute

any and all documents and take whatever steps are necessary to transfer her interest in these properties to Plaintiff.

3. Defendant shall be awarded sole right, title, and interest to the properties located at 2338 Massachusetts Avenue, N.W., Washington, D.C.; 327 East Capitol Street, S.E., Washington, D.C.; 635 South Carolina Avenue, S.E., Washington, D.C.; 643 Massachusetts Avenue, N.E., Washington, D.C.; 723 Massachusetts Avenue, N.E., Washington, D.C.; 126 11th Street, S.E., Washington, D.C.; and 641 Independence Avenue, S.E./644 North Carolina Avenue, S.E., Washington, D.C. Plaintiff shall execute any and all documents and take whatever steps are necessary to transfer any interest he has in these properties to Plaintiff [sic] .

4. Each party shall be responsible for the real estate taxes on the properties awarded to them under this order.

5. Plaintiff shall be awarded all of the personalty as set forth in Plaintiff's Exhibit #3, except for those items described in said exhibit, as English Gate leg table, William and Mary Chest on stand c. 1720, William and Mary chest of drawers, early 18th century, and four Queen Anne style dining chairs. These four items, as well as all of the other personalty in the family home shall be awarded to Defendant.

6. Plaintiff shall be awarded the 1966 Peugeot; Defendant shall execute any and all documents and take whatever steps are necessary to transfer title of this automobile to Plaintiff.

7. Plaintiff shall pay $1,000 a month to Defendant as alimony. Said payments are to be made on the first day of each month, commencing April 1, 1981.

8. At such time as Defendant becomes employed, she shall notify Plaintiff within thirty days of this change in her circumstances.

9. Plaintiff shall pay to Defendant $7,750 in satisfaction of their joint tax debt for their 1977 joint income tax return. Such payment shall be made, at Plaintiff's election, either in its entirety within 180 days from the date of this Order, or at the rate of $1,000 a month, commencing April 15, 1981.

10. Plaintiff shall pay $7,500 as attorney's fees, to counsel for Defendant. Such payment shall be made, at Plaintiff's election, either in its entirety within 180 days from the date of this Order, or at the rate of $500 a month, commencing May 1, 1981.

11. Plaintiff shall pay to Defendant the amount of $86.96 still owing to Defendant as pendente lite support for March, 1981.[16]

12. All payments shall be made through the Clerk of the Family Division, Superior Court.

/s/ Gladys Kessler
GLADYS KESSLER, JUDGE

Dated: March 26, 1981

FOOTNOTES:

1. The Court heard testimony from both parties about two incidents of alleged physical abuse, one taking place since the separation, the other almost fifteen years ago. The Court is cognizant of the fact that proceedings such as these create intense emotions that often color, and distort perceptions of past events. Thus, there is a substantial question about what, in fact, happened. Moreover, these two incidents, occurring over thirty years of marriage, are too isolated in time for the Court to make any finding that there was physical abuse by either party during this marriage.

2. The Court will rely on the tax assessment values as set forth in Defendant's Exhibit #20 for determining the value of the rental properties located in the District of Columbia.

3. The expenses on these properties, which are deducted from gross rentals, include mortgage payments, insurance, taxes, repairs, exterminator, utilities, water and sewer, oil and heat.

4. The approximate net monthly rental for this property, as well as the other six, is derived from balancing the figures submitted in Defendant's Exhibit #18, and her testimony about recent increases in rent, as well as some increases in expenses.

5. At the time of the hearing, there were approximately 50 drachmas to one dollar of U.S. currency.

6. Plaintiff's total gross earnings for that year were approximately $60,000, Defendant's were approximately $15,800, and approximately $10,000 was withheld from Plaintiff's income.

7. Mr. Marvin Cooperstein, a licensed CPA, testified on behalf of the Defendant that the refinancing could have been accomplished without increasing the amount of the mortgage payments given the small encumbrances existing on several of the rental properties. Plaintiff's resistance to the proposed refinancing, particularly since he was not making mortgage payments on any of the rental properties in 1978, is therefore not comprehensible.

8. The Court notes that this estimation is based on Plaintiff's prior years' earnings from honoraria. In 1978 and 1979, Plaintiff earned approximately $3,000 from these sources. Earnings in 1977 and 1980, however, were uncharacteristically high. In 1977, for example, Plaintiff's earnings from honoraria were approximately $10,000 because of a book he authored for the American Heritage Foundation. In 1980, his honoraria earnings were approximately $14,000. That year, Plaintiff was a Phi Beta Kappa lecturer. Plaintiff testified that these two activities were one-time only occurrences, that is, not likely to be repeated in the future.

9. In computing disposable income, the Court does not include repayments to credit union loans, which are voluntarily undertaken, but does subtract required deductions such as taxes, retirement and insurance.

10. The Court notes that counsel for Defendant objected strenuously to the admission of this testimony. He argued that the evidence was not responsive to any of Defendant's case and was thus properly part of Plaintiff's case-in-chief, not rebuttal. Since Plaintiff had closed his case before the Defendant

presented hers, Defendant's counsel urged that the testimony be excluded. The Court has considerable discretion, even in criminal trials before a jury, to let in rebuttal evidence and it was perfectly proper in this bench trial. See Fitzhugh v. United States, D.C. App. 415 A.2d 548, 551 (1980). See also Pinkard v. Hastings, 149 S.2d 293 (Ala. 1963); Boss v. Receivers of Kirby Lumber Co., 146 S.W. 658 (Tex. 1912).

11. Counsel for Defendant urged the Court to consider that Plaintiff would be leading a luxurious lifestyle with Ms. Cousins, given that their combined yearly incomes would be approximately $100,000, and that they would live at Ms. Cousins' country estate in Maryland on the weekend and in a Capitol Hill townhouse during the week.

12. In Skiff v. Skiff, supra, our Court of Appeals upheld an award of alimony to a wife who owned substantial assets in her own right. The husband argued on appeal that his wife's expected income for the year should have been greater than the amount found by the trial court, which was $13,000 to $14,000, given the existence of these income producing assets. The Court of Appeals concluded that the record did not support the husband's contentions. While there was some testimony at trial that the wife was in the process of reinvesting these securities, the evidence demonstrated that at the time of trial, she earned approximately $6,400 to $8,000 from these assets. 277 A.2d at 287. Skiff seems to stand for the proposition, therefore, that the trial court, in making a determination of alimony, is limited to actual income figures at time of trial, not what increased amount could be earned at some time in the future. The Court notes that the Skiff court did not reach the issue of whether the wife's failure to maximize income would be analogous to a husband who retires from gainful employment or fails to fully utilize

his earning power in an effort to avoid paying alimony. Id. at 287 n. 7.

13. The Court recognizes that its decision is not binding, of course, on the Internal Revenue Service.

14. Cf. Bosch v. United States, 590 F.2d 165 (5th Cir. 1979); Imel v. United States, 523 F.2d 853 (10th Cir. 1975); Beth W. Corporation v. United States, 350 F. Supp. 1190 (S.D. Fla. 1972), aff'd 481 F.2d 1401 (5th Cir. 1973), cert. denied, 415 U.S. 916 (1974).

15. According to the testimony of Mr. Marvin Cooperstein, as well as general principles of tax law, Plaintiff will be able to deduct approximately one-half of his alimony payments on his income tax return. Plaintiff, therefore, in effect will only be paying $500 a month as alimony.

16. In satisfaction of his pendente lite support obligation for March, 1981, Plaintiff tendered to Defendant his personal check for $326.09 and a tax refund check of $173.91, made out to both parties, resulting from overpayment of their joint 1977 income tax. Clearly, one-half of the amount of this refund check belonged to Defendant. It was, therefore, not proper for Plaintiff to use the entire check for payment of pendente lite support and he is liable, under Court order, for the balance.

SUPERIOR COURT OF THE DISTRICT OF COLUMBIA

FAMILY DIVISION

DOMESTIC RELATIONS BRANCH

WILCOMB E. WASHBURN	)	
	)	
Plaintiff,	)	
	)	
v.	)	Docket No. D-696-79
	)	
LELIA K. WASHBURN	)	
	)	
Defendant	)	

ORDER

This matter is before the Court on Plaintiff's Motions to Amend Order and to Reopen Proceedings, Defendant's Opposition thereto, and Plaintiff's Response to Defendant's Opposition. After careful consideration of these pleadings, the extensive record in this case and the lengthy opinion filed on March 26, 1981, the Court reaches the following conclusions:

affirmative duty imposed on the Defendant by the Court. Such requirement in no way changes or shifts the burden of proof on the parties in any future proceedings to modify support obligations. The parties are bound by existing case law. See, e.g., Alibrando v. Alibrando, D.C. App., 375 A.2d 9 (1977); Tydings v. Tydings, D.C. App., 349 A.2d 462 (1972). The Court will however amend its Order so as to require Defendant to notify Plaintiff in the event her taxable income increases by 10% or more of her 1980 taxable income.

6. Plaintiff's Motion to Reopen the Proceedings shall be denied. Although Plaintiff avers that he "may" be suffering from a life threatening illness, he does not specifically say what that illness may be nor when he underwent the physical examination that revealed the possibility of this illness.[1] Nor was any mention made of this possible

illness during the trial. Moreover, the arguement offered by Defendant in her opposition is irrefutable; that is, if she suffered another stroke today, the Court would not reopen the proceeding for further circumstances of her health. Accordingly, the Court will not reopen the trial to consider issues of Plaintiff's health not brought to the Court's attention until after its Order was filed. As to Plaintiff's assertions that he can now present evidence that Defendant could take proceeds from the sale of her Greek properties out of Greece, such evidence should clearly have been presented at trial. Nor does Plaintiff offer any explanation for his failure to have presented it. Furthermore, the non-convertability of drachmas was only one of two reasons for the Court's not considering Defendant's Greek property in making its distribution of the marital property. As noted in its March 26, 1981 Opinion, the Court

1. Plaintiff's Motion to eliminate or diminish the amount he is required to pay Defendant towards the 1977 joint tax liability is denied. The parties' total liability was calculated on the basis of their joint income and Plaintiff earned far more than one-half of this income. It is just and equitable, therefore, that he pay one-half of the debt Defendant incurred on account of that liability.

2. Plaintiff's Motion to Amend the schedule by which he is to pay his share of the 1977 tax liability and to contribute towards Defendant's attorney's fees shall be granted.

3. Plaintiff's Motion to Amend the March 26, 1981 Court Order so that Defendant is required to assume any capital gains tax liability that may result from the Court's distribution of marital property is denied. The Court gave full consideration to this issue when it reached its decision in this

proceeding. Plaintiff offers nothing to compel amendment of that decision.

4. Plaintiff's Motion to Amend the March 26, 1981 Court Order so that he is awarded the property at 327 East Capitol Street instead of the property at 606 East Capitol Street is denied. At time of trial, 606 East Capitol Street was the rental property having the greatest amount of equity. Moreover, there are no real estate taxes owing on the property. The award of 606 East Capitol Street to the Plaintiff was a purposeful one, made in light of these factual considerations, and as part of the entire property award. Plaintiff does not offer any compelling reasons for amending that award.

5. Plaintiff's Motion for further findings on the issue of future changes in Defendant's circumstances is denied. The requirement to notify Plaintiff in the event of her returning to work is simply an

gave little weight to the appraisal of the Greek property offered at trial by Plaintiff. Thus, even if evidence regarding Defendant's ability to take sale proceeds out of Greece was newly discovered, which it clearly is not, such evidence would not compel the Court to reopen proceedings to reconsider its distribution of the marital property. Finally, the new tax assessments on the property are not proper grounds for reopening the proceedings because they are facts arising after trial, not newly discovered evidence, and are subject to change on a yearly basis.

WHEREFORE, for all of the foregoing reasons, it is this 1st day of June, 1981, hereby,

ORDERED: That,

1. Plaintiff's Motion to Reopen Proceedings shall be denied.

2. Paragraph #9 of the March 26, 1981 Memorandum and Opinion Order shall be amended as follows:

"Plaintiff shall pay to Defendant $7,750 in satisfaction of their joint tax debt for their 1977 joint income tax return. Such payment shall be made, at Plaintiff's election, either in its entirety within 90 days from the date title to the marital property is transferred pursuant to the terms of this Order, or at the rate of $1,000 a month, commencing 45 days from the date of the aforesaid transfer of title."

3. Paragraph #10 of the March 26, 1981 Memorandum Opinion and Order shall be amended as follows:

"Plaintiff shall pay $7,500 as attorney's fees to counsel for Defendant. Such payment shall be made, at Plaintiff's election, either in its entirety within 90 days from the date title to the marital property is transferred pursuant to the terms of this Order, or at the rate of $500 a month, commencing 45 days from the date of the aforesaid transfer of title."

4. Paragraph #8 of the March 26, 1981 Memorandum Opinion and Order shall be amended as follows:

"At such time as Defendant becomes employed or her taxable income increases by 10% or more of her 1980 taxable income, she shall notify Plaintiff within thirty days of such changes in her circumstances."

5. All other matters raised in Plaintiff's Motion to Amend shall be denied.

/s/ Gladys Kessler
Gladys Kessler, Judge

Dated June 1, 1981

FOOTNOTE:

1. The Court notes that on June 1, 1981 it received in Chambers, a praecipe filed by Plaintiff withdrawing that part of his Motion based upon newly discovered evidence regarding his health because final diagnosis revealed no life-threatening illness at this time.

SUPERIOR COURT OF THE DISTRICT OF COLUMBIA

FAMILY DIVISION

DOMESTIC RELATIONS BRANCH

WILCOMB E. WASHBURN Plaintiff,	)	
v.	)	Docket No. D-0696-79
LELIA K. WASHBURN Defendant	)	

ORDER

This matter is before the Court on Defendant's Motion for Authorization to Manage Property and to Compel Accounting of Income, Plaintiff's Opposition thereto, and Defendant's Motion to Compel Compliance with Judgment, and Defendant's Points and Authorities in Opposition thereto.

In February, 1981, this Court heard many days of testimony and issued a comprehensive Opinion on March 26, 1981, amended

June 1, 1981, granting the Plaintiff an absolute divorce, and making a disposition of the real and personal property acquired by the parties during the course of the marriage, allocating debts and awarding attorney fees. Plaintiff has exercised his right to appeal from this Court's decision.

It is well settled in this jurisdiction that an appeal does not stay the effectiveness of a judgment of the trial court. Smith v. Smith, 256 A.2d 833 (D.C. App. 1969), Laughlins v. Berens, 75 U.S. App. D.C. 409, 128 F.2d 23 (1942). An exception to this rule exists where an appellant files a supersedeas bond pursuant to Superior Court Rule 62(d). The plaintiff in this instance has not filed such a bond so as to fall within the exception to the general rule. The general principle of law will be applied in this case and therefore Plaintiff's Motion for Authorization to Manage Property is denied and the Defendant's

Motion to Compel Compliance with Judgment is granted.

WHEREFORE, it is hereby this 26th day of October, 1981,

ORDERED: That Plaintiff's Motion for Authorization to Manage Property is denied and Defendant's Motion to Compel Compliance with Judgment is granted.

/s/ Gladys Kessler
Gladys Kessler, Judge

Dated: October 26, 1981

(Entered on October 29, 1981)

SUPERIOR COURT OF THE DISTRICT OF COLUMBIA

FAMILY DIVISION

WILCOMB E. WASHBURN, Plaintiff	)	
vs.	)	Jacket No. D 696-79
LELIA K. WASHBURN, Defendant	)	Filed February 10, 1982

FINDING OF FACT, ORDER OF ADJUDICATION AND COMMITMENT

This matter having come on for hearing upon the motion to adjudicate the plaintiff in contempt for failure to comply with the order of this Court dated the 26th day of March, 1981, it is by the Court this 10th day of February, 1982,

FOUND, as a fact that the plaintiff has failed and refused to obey said order of this Court in that he has willfully refused

to comply with paragraph 3, page 36 of the Court's order of March 26, 1981, and admitted such refusal in open court. Although able so to do, by reason whereof he is in contempt of this Court; therefore it is

ORDERED, that the United States Marshal in and for the District of Columbia is hereby directed to take into his custody the person of the plaintiff, Wilcomb E. Washburn and commit him to the District of Columbia Jail until such time as he shall purge himself of his contempt by obeying such order or until further order of the Court hereon.

/s/ Peter H. Wolf
Judge

STAY OF EXECUTION

And it is further,

ORDERED, that execution of this commitment is stayed to February 18, 1982 upon the following conditions: that plaintiff comply

with paragraph 3, page 36 of this Court's order of March 26, 1981, provided that Charles H. Meyers, Esq. make the necessary documents available no later than February 17, 1982 in or near his office.

/s/ Peter H. Wolf

Judge

DISTRICT OF COLUMBIA
COURT OF APPEALS
500 Indiana Avenue, N.W.
Washington, D.C. 20001
(202) 638-7113

No. M 151-84

NOTICE

The Board of Judges of the District of Columbia Court of Appeals is proposing two new provisions to the Internal Operating Procedures as set forth below:

IV The Motions Division

***

F. The motions division shall act by a quorum (two judges), inviting participation by the tie-breaker only when there is not unanimity. However, when a motions division ruling is to be published, or when the division is ruling on an application for

SUPERIOR COURT OF THE DISTRICT OF COLUMBIA

Family Division

WILCOMB E. WASHBURN, Plaintiff	)	
v.	)	No. D 696-79
LELIA K. WASHBURN, Defendant	)	

O R D E R

The Court has before it the plaintiff's Request for Clarification of Order of Februar 10, 1982, the defendant's response, and the plaintiff's reply to defendant's response. Having considered the above and the appropriate portions of the entire file, the plaintiff's "request" is hereby DENIED.

/s/ Peter H. Wolf
PETER H. WOLF
Judge

Dated: April 14, 1982

In Chambers

DISTRICT OF COLUMBIA COURT OF APPEALS

No. 83-331

WILCOMB E. WASHBURN, APPELLANT,

v.

LELIA K. WASHBURN, APPELLEE.

Appeal from the Superior Court of the District of Columbia

(Hon. Paul R. Webber, III, Trial Judge)

(Submitted February 15, 1984 Decided May 8, 1984)

Wilcomb E. Washburn filed a brief *pro se.*

Charles H. Mayer was on the brief for appellee.

Before MACK, PRYOR, and TERRY, *Associate Judges.*

PER CURIAM: This is an appeal from an order of the Superior Court denying appellant's motion for attorney's fees. Appellant had sought an award of $375 "for the actual cost of defending himself" against a motion to hold him in contempt, which was withdrawn by appellee after appellant had filed an opposition *pro se.* The trial court denied the motion for attorney's fees, finding that appellee's actions had not been unreasonable or improper, and that there was no evidence that appellee had acted in bad faith in filing the motion for an adjudication of contempt. Although we are troubled by some aspects of the case, we nevertheless affirm the trial court's ruling.

allowance of appeal, all three members of the motions division shall participate.

IX Publication of Opinions

***

D. Whenever a judge must recuse himself or herself after the case is submitted or argued, the remaining members of the division shall consider whether the issues are of sufficient difficulty (including but not limited to their own inability to agree) to make it advisable or necessary to draw a third judge. If a third judge is drawn after argument, the division shall decide whether the case shall be reargued or whether the newly-drawn judge shall hear

the argument from the tape of the courtroom proceedings. In any event, after a recusal, a third judge shall be drawn for any submitted or argued case requiring a published opinion.

This matter has been designated as M 151-84. Published pursuant to the March 7, 1979, en banc order of this court, this notice is to afford interested parties an opportunity to submit written comments. Ten copies of any comments are to be deposited with the Clerk, District of Columbia Court of Appeals, 500 Indiana Avenue, N.W., Room 6000, Washington, D.C., 20001, on or before Tuesday, May 1, 1984.

/s/ Alan I. Herman
Alan I. Herman
Clerk of the Court

March 23, 1984

I

Appellant and appellee were divorced in 1981 after a lengthy and sometimes acrimonious proceeding in the trial court.[1] The judgment awarding appellant the divorce directed him to pay $7,500 in attorney's fees to his wife's counsel, in monthly installments of $500, following the transfer of certain properties. The judgment specified that all payments were to be made through the clerk of the Family Division of the Superior Court. By mistake, however, appellant made his first payment in April 1982 by mailing a check directly to appellee's counsel. After rereading the court's order and discovering his error, he thereafter made all his payments to the clerk of the court. Appellant delivered his check for the May installment to the clerk's office on May 24, but counsel did not receive the money from the clerk until June 2.

Appellant made the payments for June and July on time, but they were not forwarded promptly to counsel by the clerk. On July 22, having received no payment for June and fearing that he would receive none for July, appellee's counsel wrote to appellant:

> I would like to have these payments made in a timely manner and in accordance with the court order. I do not mind if they are made in the latter part of each month for the month involved, but I do want to receive them within the proper month. I see no necessity for you to make these payments through the court, since you will have a cancelled check from me in every case and can easily show that you have made payment, but I have no objection to the

[1] The judgment in the divorce action was recently affirmed by this court in an unpublished memorandum opinion. *Washburn v. Washburn*, No. 81-906 (D.C. January 24, 1984).

> payments coming through the court if you insist on making them that way provided they get here by the end of the month.
>
> I would like to have this matter brought up to date without having to take any further legal action so I urge you to see that the June and July payments are made very promptly, and that future payments be made as indicated above.

Appellant did not respond to this letter. When no payments came in July, appellee filed a motion on August 4 asking the court to hold appellant in contempt for "willful disobedience" of the court's judgment. Appellant, acting *pro se*,[2] filed an opposition on August 6, asserting that he had faithfully made the monthly payments to the clerk of the court as the judgment had commanded him to do, and suggesting that appellee's grievance lay with the clerk's office, not with him.

On August 9 appellee's counsel wrote to appellant, expressing his surprise at being told that appellant had made the payments in June and July, since he had never received them. He also said that after reading appellant's opposition, he had spoken with Sidney Sprinkle, head of the finance section of the clerk's office, who had told him "that there [was] no record of receipt by his office of either the June or July check." Counsel's letter concluded:

> As I said to you in my earlier letter, all of this turmoil about payments could be easily resolved by your simply sending the payments directly to me by your personal check. *I am aware of the final paragraph of Judge Kessler's*

[2] Appellant had the assistance of counsel in the divorce proceeding, but since then he has represented himself.

> *original opinion and order which says that all payments are to be made through the clerk of the court, but I am prepared to waive that requirement and have you pay me directly.* If you do so, you will have a cancelled check for each payment and there will be no issue as to whether you have paid or not.
>
> In the absence of your agreement to the foregoing and/or making up the payments that are due, I intend to go forward with my motion because, in fact, I have not received the payments. [Emphasis added.]

Appellant responded in a letter dated August 11, pointing out that he had a "responsibility to pay the award in the manner ordered by the court," and stating that he did not intend to violate the court's order merely because counsel was willing to waive the requirement of payment through the clerk's office. On the same day, August 11, appellee's counsel received a check for $1,000 from the clerk's office, "unaccompanied by any explanation of why [he] had previously been told that the two payments in question had not been received" (Appellee's Brief at 3). Counsel immediately withdrew the motion to hold appellant in contempt.

A few weeks later appellant filed a motion seeking $375 in "reimbursement" for the "actual cost of defending himself against [appellee's] frivolous and ill-considered motion." After a hearing, the trial court denied the motion in an order which contained three findings:

> 1. That the record lacks any evidence showing that the defendant acted in bad faith in filing the Motion to Adjudicate plaintiff in contempt.
>
> 2. That the defendant's actions in her attempt to receive the attorneys fees that were

due her pursuant to this Court's order were not unreasonable or improper in light of the fact that certain payments were not received by her counsel when due.

3. That the record indicates that the defendant acted on what she believed to be accurate information from the Superior Court's finance office, that no payments had been made for the months of June and July 1982.

The third finding cannot be sustained, because the motion to hold appellant in contempt was filed several days before counsel's conversation with Mr. Sprinkle; indeed, it is undisputed that counsel called Mr. Sprinkle *after* reading appellant's opposition to the motion. The first two findings, however, are supported by the record and give us a sufficient basis to affirm the denial of the motion for attorney's fees.

II

This court has not yet decided whether a *pro se* litigant may ever recover attorney's fees for his own efforts. Almost all the courts that have considered the issue, however, have refused to grant attorney's fees to *pro se* litigants, albeit for varying reasons. *See* Note, *Pro Se Can You Sue? Attorney Fees for Pro Se Litigants*, 34 STAN. L. REV. 659, 666-669 (1982). Only the federal courts in the District of Columbia have consistently awarded such fees, and even in these instances the courts have acted under specific statutes authorizing attorney's fee awards, though not necessarily to *pro se* litigants. *Crooker v. U.S. Department of the Treasury*, 213 U.S. App. D.C. 376, 663 F.2d 140 (1980) (Freedom of Information Act); *Quinto v. Legal Times of Washington, Inc.*, 511 F. Supp. 579 (D.D.C. 1981) (Copyright Act); *Jones v. United States Secret Service*, 81 F.R.D. 700 (D.D.C. 1979) (Freedom of Information Act); *Holly v.*

Acree, 72 F.R.D. 115 (D.D.C. 1976) (Freedom of Information Act), *aff'd sub nom. Holly v. Chasen*, 186 U.S. App. D.C. 329, 569 F.2d 160 (1977); *cf. Cuneo v. Rumsfeld*, 180 U.S. App. D.C. 184, 190-191, 553 F.2d 1360, 1366-1367 (1977).[3] Appellant's claim is not based on a statute, and thus the rationale of those cases, even if we chose to follow them, would not necessarily apply here.

Appellant maintains that the contempt motion which appellee filed below was unfounded and brought in bad faith. On the undisputed facts in this case, we conclude that the trial court did not err in denying appellant's request for attorney's fees on the ground that there was no evidence of bad faith and that appellee's actions were "not unreasonable or improper . . . ." We therefore need not decide the broader issue of whether attorney's fees may ever be awarded to a *pro se* litigant. We leave that issue for resolution in some future case.

III

It has long been established in American jurisprudence that attorney's fees are not ordinarily recoverable by a prevailing litigant unless a statute or a contract specifically provides for an award of such fees. *Fleischmann Distilling Corp. v. Maier Brewing Co.*, 386 U.S. 714, 717 (1967); *accord, e.g., Alyeska Pipeline Service Co. v. Wilderness Society*, 421 U.S. 240, 247 (1975). The courts have recognized a few narrow exceptions to this so-called "American rule," but in the absence of one of these exceptions, "the rule has been consistently followed

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[3] It is incorrect to say that "the District of Columbia courts have consistently held that pro se litigants may receive attorney fees . . . ." Note, *Pro Se Can You Sue?*, *supra*, 34 STAN. L. REV. at 667. While the *federal courts* in the District of Columbia have so held, the *District of Columbia courts* have never addressed the question. Today we address it for the first time but do not answer it.

for almost 200 years." *Summit Valley Industries, Inc. v. Local 112, United Brotherhood of Carpenters*, 456 U.S. 717, 721 (1982) (citations omitted). The exception on which appellant relies is the one which allows attorney's fees to be "awarded to a successful party when his opponent has acted in bad faith, vexatiously, wantonly, or for oppressive reasons . . . ." *F.D. Rich Co. v. United States ex rel. Industrial Lumber Co.*, 417 U.S. 116, 129 (1974) (footnote omitted); *see Wisconsin Avenue Associates, Inc. v. 2720 Wisconsin Avenue Cooperative Ass'n*, 385 A.2d 20, 24 (D.C. 1978). We agree with the trial court that appellant failed to make the kind of showing which would entitle him to relief under this exception.

In retrospect it is clear that appellee's counsel drew an erroneous inference when he failed to receive appellant's payments on time. Instead of assuming that appellant was in default, counsel should have made some inquiry at the clerk's office to find out whether appellant had made the payments there, as directed by the court, before filing a motion to hold him in contempt.[4] Moreover, counsel was not justified in offering to "waive" the requirement of the court's order that payment be made through the clerk's office. A court order is not waivable. Appellant had a right to insist on following the command of the court; indeed, had he not done so, he would have been in contempt. If appellee's counsel felt that this arrangement was inconvenient, he could easily have asked the court to modify its order; he should not have invited appellant to disobey it.

Nevertheless, despite counsel's precipitous filing of the contempt motion, we cannot say that his conduct was so

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[4] The motion was filed on August 4, but counsel's conversation with Mr. Sprinkle did not take place until after he had received and read appellant's opposition, which was filed on August 6 and served by mail the same day.

egregious as to be vexatious or oppressive, or that he acted in bad faith. Given the bitter history of this case, and particularly the many harsh disputes over the distribution of property, it was not totally unreasonable for counsel to suspect that appellant might have been in default on his payments. Counsel also had a right to expect that the clerk's office would do its job properly, even though in this instance that expectation was not met. In these circumstances counsel's conduct cannot be deemed so outrageous or improper as to justify an award of attorney's fees under the standard set forth in the *F.D. Rich* case, *supra.*

The ultimate fault in this case, of course, rested with the Superior Court clerk's office. Appellant stated in his opposition to the contempt motion that when he made his July payment, he alerted the clerk's office to the fact that previous payments had not reached their destination promptly. Two weeks later, however, according to counsel's August 9 letter, Mr. Sprinkle told appellee's counsel that his office had no record of any payments for June and July. If there was in fact no such record, we find its absence inexcusable. The clerk's office has a duty to maintain accurate, up-to-the-minute records of all matters before the court. Litigants and lawyers must depend on the proper performance by the clerk's office of its assigned tasks. Any failure in that performance can only diminish public confidence in the courts and the administration of justice. We are confident, therefore, that the Clerk of the Superior Court will take all necessary steps to ensure that the lapses which occurred in this case, whatever they may have been, will not occur again.

The order denying appellant's motion for attorney's fees is

Affirmed.